JUDICIAL CORRUPTION AND VETTING PROCESS – COMPARATIVE ANALYSIS FROM WESTERN BALKAN COUNTRIES

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Abstract

Corruption, especially in the judicial system, is a phenomenon that violates the most crucial principle that is equality before the law and deprives people from their basic rights, including the right to a fair trial regulated under Article 6 of the European Convention on Human Rights. When a judicial system is corrupted, the influence that is made through material values, such as money, may decide which cases are prioritized or which can be dismissed, so the real perpetrators remained unpunished whereas the victims are left without any answer and consequently without justice.

In order to fight this widen phenomenon, a large number of public institutions such as the World Bank and independent organizations including TI, ICJ, Judicial Integrity Group (JIG), and International Bar Association are engaged in developing strategies for advancing judicial integrity but another important mechanism that is crucial for increasing judicial integrity is through the Vetting process, which according to U.N is a formal process for the identification and removal of officials responsible for abuses, especially from several areas including the judiciary.

There are a considerable number of countries that implemented the Vetting process including the Republic of Albania, the Republic of Bosnia and Herzegovina and the Republic of Serbia, whereas in the Republic of North Macedonia, the Vetting process isn't functional but with the amendment of the the Law on Courts and the Law on the Judicial Council of the Republic of North Macedonia on May 2nd, 2018 based on the 2017-2022 Judicial Reform Strategy and Action Plan, the aim of making a deep change in the system of evaluation and dismissal of judges was reached. It is important however to know that more initiatives need to be taken in order to upgrade the justice system and increase the public trust in the countries of the Western Balkan.

Keywords: Corruption, Judicial System, Vetting, Public Trust, Justice

Introduction

An independent judiciary and clean law enforcement are central to democracy and rule of law. Strengthening independent judiciaries through higher salaries and better legal protection is an effective way to tackle corruption, holding the corrupt accountable and giving their victims justice. People's experiences with the judiciary and law enforcement are often very different from this: many face demands for bribes to dismiss a charge, fast-track a case or slow down a trial. Judges can also be bribed, or subject to political pressure and interference from above.

Corruption in the judicial system breaks the basic principle of equality before the law and deprives people of their right to a fair trial. In a corrupt judicial system, money and influence may decide which cases are prioritized or dismissed. Perpetrators may get away unpunished while victims are left with no answer and no justice.

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A well-functioning justice system is crucial to address corruption effectively, which in turn is important for development. Surveys show that experiences with and perceptions of corruption in the courts are widespread (Afrobarometer, 2010; Latinobarometer, 2010; Eurobarometer, 2011; TI, 2011; GCR, 2012: 303; World Justice Project, 2012).

In its 2011 Annual Report, Transparency International (TI) noted that, globally, almost half of those surveyed (46 percent) perceived their judiciary as corrupt. According to the Eurobarometer (2012), around a third of Europeans think corruption is widespread in their judicial services (32 percent). In Bangladesh, 88 percent reported having experienced corruption when dealing with the courts (TI, 2012: 23), 85 percent of Peruvians had little or no confidence in their judiciary (Latinobarometer, 2010), and in countries as diverse as Afghanistan, Bolivia, Bulgaria, Cambodia, Croatia, Ethiopia, Georgia, the Former Yugoslav Republic of Macedonia, Morocco, Peru, and Ukraine, the judiciary was seen as the most corrupt of all public institutions (TI, 2012: 19).

Corruption and perceptions of corruption in the judiciary not only undermine the courts' credibility as corruption fighters. More generally, it erodes trust in the courts' impartiality, harming all the core judicial functions, such as dispute resolution, law enforcement, protection of property rights, and contract enforcement. In addition, it harms the broader accountability function that the judiciary is entrusted with in democratic systems – upholding citizens' rights, securing the integrity of the political rules of the game, and sanctioning representatives of other branches when they act in contravention of the law.

While there is a broad consensus that corruption in the court system is destructive and should be addressed, there are particular challenges involved in fighting judicial corruption. Anti-corruption efforts may jeopardize the independence of the judiciary and thus undermine judges' ability to fulfill their accountability functions. In fact, limiting judicial .

Corruption in the judicial system

Bribery in the judicial system is a problem in many developing countries as well as in more developed economies. Bribes offered by users of the legal system may take many forms, including illegal 'fees' that court personnel levy to do what they should do anyway. Court users pay just to get their case through the system, to influence the outcome of a given case, or to delay it. Bribes may be paid to the judge, or to assistant staff or lawyers to remove files or get the case assigned to a particular judge. Where petty corruption is prevalent it creates an additional barrier for ordinary citizens to access the justice system. For poor people, the sums involved may be prohibitive. Even where it does not directly affect case outcomes (and even more so when it does), bribery adds to the class bias of the justice system and strengthens exclusionary patterns based on gender, race, ethnicity, caste, and so on.

Widespread bribery also erodes trust in the courts and distorts their ability to perform their functions as impartial arbiters of disputes, guarantors of contracts, and enforcers of the law. Bribery is not only a problem in formal judicial institutions, but commonly also in alternative administrative and judicial institutions (variably termed informal, traditional, customary, community, or nonstate) that most people in the developing world turn to for lack of access to or trust in the formal justice system (Golub, 2007; Nyamu-Musembi, 2007). The share of respondents who report having experienced bribery when being in contact with the judiciary is

alarming. Still, a much higher percentage perceives their judiciary to be corrupt (TI, 2007: 42). Media reports of high-profile corruption scandals and allegations of political bias among judges contribute to shaping citizens' perceptions of corruption.

Undue Political Influence Judges' political bias and people's perceptions of such undermines the role of the judiciary as protector of citizens' rights vis-à-vis the state in its various manifestations. It leaves ordinary people without effective recourse to justice when the state is the offending party, and with scant protection when the state presses charges. The political bias is not necessarily consistent across all types of cases. It tends to tick in when the stakes are high, such as when the executive or other power-holders feel their position threatened. It is thus particularly damaging for the courts' political accountability function, their ability to impartially Corruption, grabbing and development (Elgar Online at 01/07/2014 10:40:29AM via EEP Inc. enforce the rules of the political system, for example in relation to election fraud (Gloppen et al., 2004; Gloppen, 2010).

Illegitimate political influence on judges take different forms, some are clearly illegal (bribes, blackmail, threats, violence/murder), while other forms of undue influence stem from the ways in which relations between the judiciary and other arms of government are organized, or reflect a legal culture where judges are expected to defer to political authorities. Structural sources of political bias in the judiciary are related to procedures for the appointment of judges and judicial leadership; terms and conditions of tenure for judges; and budgetary and financial regulations, including salaries and benefits: Judicial appointments Where the government is perceived to appoint deferential judges – or friends – to the bench, it damages trust in the judiciary, regardless of whether the judges are in fact biased in their rulings. In many countries, the executive (is widely perceived to) decisively influence who is appointed as judges – even when there are rules and institutions in place to prevent this from happening. Judicial service commissions or other bodies designated a role in nominations are often effectively circumvented – or themselves 'packed' and politically biased. Rules of ratification or confirmation by parliament have often limited effect, particularly in dominant party contexts. In some cases, the executive, like President Museveni in Uganda, has explicitly expressed intentions to 'appoint cadres to the bench' (Gloppen et al., 2004; Gloppen and Kazimbasi, 2008; Gloppen, 2010). In South Africa, some have interpreted ANC government officials as having a similar intention when they pursue the (otherwise legitimate) aim of 'transformation of the judiciary' (DA, 2007; Molel and Makinana, 2012).

Terms and conditions of tenure where judges are appointed for limited terms, and particularly where the terms of service are renewable and short, judges have an incentive to rule with an eye on the interests and preferences of those for whom they depend for reappointment (or new employment after they finish their judicial tenure). The same is true where judges' promotion/demotion depend on being favored by their superiors, and where the security of tenure in practice is weak. Formal rules to protect tenure may not be sufficient to allay judges' fears if experience shows that they in practice risk losing their seat if they fall out of favor with the government, or when administrations change (Gloppen, 2010). Courts, corruption and judicial independence (Elgar Online at 01/07/2014 10:40:29AM via EEP Inc. Regulation of finances, including salaries and benefits Control over the purse strings give many governments a stronghold – if not a stranglehold – over the courts, by enabling them to strategically regulate not only judges' salaries and benefits, but also the running costs of the judiciary.

Undue Influence via the Internal Judicial Hierarchy In many cases, undue influence on judicial rulings comes not from politicians directly, but via the judicial hierarchy (Gloppen, 2010). Such

influence may be the result of direct pressure from superiors; more subtle incentives based on judges' anticipation that a 'wrong' decision in an important case could have career consequences; or selective allocation or cases to judges who are likely to rule in a particular manner. Besides, internal procedures can be misused to limit individual judges' ability to voice criticism, for example by refusing dissenting judgments. Hence, where the judicial leadership – and in particular the chief justice – is (seen to be) close to the sitting regime, this can taint the entire judiciary. Even where judicial appointments are otherwise effectively regulated in ways that place them beyond executive influence, the executive often has a much stronger say over the appointment of the chief justice and judge presidents (Gloppen, 2010).

To sum up, corruption in the judiciary is undoubtedly widespread – and perceptions of judicial corruption even more so. There are many sources, both bribery and undue political influence undermining judicial independence. Given the apparent scale and importance of this problem, it is essential to understand the mechanisms at play and examine efforts to address it. Efforts to reduce the challenges are many, but before turning to that, we will now consider how allegations of corruption among judges can be a powerful strategic tool. And disciplining systems ostensibly put in place to combat corruption may have the – intended – side effect of undermining judicial independence.

Understanding the concept of vetting as a key policy tool of fight corruption

Vetting, as one of the mechanisms that can prevent corruption, despite of its importance, in general has received less attention from numerous academics, transitional justice professionals and its stakeholders. Taking into consideration this fact, the author Maja Kova, in her work called "Vetting as an Element of Institutional Reform and Transitional Justice." tries to make a definition of Vetting as a measure to reform abusive institutions in post-conflict and/or post-communist societies. Another definition that the author has been relied on is by UN Secretary-General's definition which defined Vetting as "…a formal process for the identification and removal of individuals responsible for abuses, especially from the police, prison services, the army and the judiciary." Therefore, if we complete both definitions, we can stipulate that Vetting is a mechanism that not only removes individuals responsible for past abuses, but also aims on evaluation of the candidates for public employment based on their integrity and professional capacity (Kovac, 2007).

In order to see how the Vetting process functions in practice, we are going to analyze three countries that respectively had embraced this mechanism and those are the Republic of Albania, the Republic of Serbia, and the Republic of Bosnia and Herzegovina. Also we will analyze the work of the Republic of North Macedonia on prohibiting corruption.

The vetting process in the Republic of Albania

The Vetting process in the Republic of Albania, started with the regulation of the Law no. 84/2016 dated 30.08.2016 "On the re-evaluation of judges and prosecutors in the Republic of Albania." Through this law, special rules have been established for the re-evaluation of all subjects that are part of the judiciary system with the aim of guaranteeing the functioning of the rule of law, ensuring the independence of the justice system, as well as returning the public trust regarding the judiciary system, as it is stipulated in the Article 179/b of the Constitution of the Republic of

Albania (The Reform in the Justice System, 2017).
The process of re-evaluation is conducted on the basis of three criterias:
- Evaluation of the assets;
- Evaluation on the basis of the moral integrity of the subject;
- Assessment of professional ability;

Regarding the institutions of the re-evaluation, they are divided into three:
- The Independent Qualification Commission (IQC);
- The Appellate College;
- Public Commissioners, in cooperation with international observers (Article 5 of the Law on Re-Evaluation of Judges and Prosecutors);

The first two bodies, the Independent Qualification Commission and the Appellate College, are the institutions that decide on the final re-evaluation of the subjects. The decision that those bodies make are based on one or all abovementioned criterias in the overall evaluation proceeding. As for the quality of proceedings, the cases need to be handled in a timely manner by the re-evaluation institutions, especially the cases regarding the members of the Constitutional Court, the Supreme Court, and the General Prosecutor's Office.
The activity of the Commission is directed by its Chairman, the competencies of which are:
- To prepare, summon and direct the gathering of its members;
- To represent the Commission as a body and the Appellate Panel;
- To direct the lottery process regarding the members that will hold the re-evaluation of the subject (Article 13 of the Law on Re-Evaluation of Judges and Prosecutors).

The commission is organized in four trial panels consisting of three members for each panel, who are appointed by lot. The distribution of cases in the trial panels is done by the lottery process, where the rapporteur member is chosen. The trial panel of the Commission is headed by the Chairman, which is chosen among the members. In his/her absence, the panel is led by the older member. On another side, the Appellate College has the duty to review any appeal that has been brought against the decisions of the Commission and has a nine-year mandate.
The Appellate College adjudicates in a panel composed of five judges, who are appointed by the lottery process in each case. The trial panel of the College is chaired by the President, who is also appointed through a lottery process for each respective case (Article 15 of the Law on Re-Evaluation of Judges and Prosecutors).
The members of the Commission, the judges of the Appellate Panel, and the international observers have the duty to analyze and assess all the facts and circumstances necessary for the re-evaluation procedure. During the scrutiny, the Commission, the Appellate College, and the international observers can make a request to any subject of the public law to provide them information on the basis of the documents that they administer (Article 45 of the Law on re-evaluation of judges and prosecutors). On another side, the subject of the re-evaluation co-operates with the Commission and the Appellate Panel, which on issuing the decision, they are taking into account the readiness and behavior of the subject of the re-evaluation during the process (Article 48 of the Law on Re-Evaluation of Judges and Prosecutors).
At the end of the trial, the Commission may decide for the subject of re-evaluation whether to confirm him/her in the office, whether to suspend him/her from the duty for a period of one year, whether to impose an obligation on the subject of re-evaluation to attend the training program according to the curricula approved by the School of Magistrates or to dismiss the subject from his/her duty (Article 58 of the Law on Re-Evaluation of Judges and Prosecutors).

The vetting process in the Republic of Bosnia and Herzegovina

The post-Dayton judicial system was not efficient at all. Property rights were not protected, cases relating to attacks on the people who returned from the forced displacement were not completed, and to add as the cherry on top of the cake was that war criminals were not indicted. During the first years after the Dayton Peace Agreement was signed, the initiative for judicial reform was negative since the parties to the agreement did not make serious efforts for reforming the courts and the attorney's general offices, and a part of such a failure was also the international community that failed to intervene. Because there was a failure in putting into a re-evaluation process the serving judges and prosecutors, and to remove those that were unsuitable for office, the international Independent Judicial Commission (IJC) developed a strategy to replace the ongoing re-evaluation process with a reappointment process. That means that all judges and prosecutors were made to re-apply for their current posts. The reappointment procedure aimed not only to ensure that in the justice system there would be a high degree of professionalism amongst judges and prosecutors but also to restructure the court system, reducing its size and ensuring proper ethnic representation (United Nations Development Programme and Bureau for Crisis Prevention and Recovery Justice and Security Sector Reform, 2006).

The duty for the reappointment process and the restructuring of the court and prosecutorial systems were implemented by the High Judicial and Prosecutorial Councils (HJPC) that were independent bodies composed of judges and prosecutors. High Judicial and Prosecutorial Councils were composed of three councils with a total number of seventeen national members and eight international members, two of whom served as the President and Vice President. The restructuring of the courts would be conducted on the basis of three principal criteria: the workload that judges have, the population represented and served by the court, and the distance from the place where the citizens live until the next largest court. According to the observations made by United Nations Development Programme (UNDP), 30% of all first-instance courts were immediately closed, and also the number of judges and prosecutors was calculated according to the inflow of cases where on the basis of the results there was a reduction of almost 30% of the judges whereas among the prosecutors only 1% (United Nations Development Programme and Bureau for Crisis Prevention and Recovery Justice and Security Sector Reform, 2006).

Regarding the reappointment process, it was assured that all judicial and prosecutorial posts were vacant and also all qualified professionals were eligible to apply in an open competition. Judges and prosecutors that were not removed from the office also had to re-apply for their positions and the constitutions of each entity had to be modified under the will of the High Representative with the aim of removing life tenure guarantees for judges. According to the observation made by UNDP in 2004, there were only 4800 complaints received from the public against judges and prosecutors, and as of May 2004 the Office of the Disciplinary Prosecutor had reviewed 4514 complaints but only 750 complaints were deemed fulfilled. The opportunity for the replacement of public employees and the restructuring of public administration was limited because of the "brain drain" that Bosnia and Herzegovina faced during and after the conflict which consequently limited the number of applicants for judicial and prosecutorial posts (United Nations Development Programme and Bureau for Crisis Prevention and Recovery Justice and Security Sector Reform, 2006).

The vetting process in the Republic of Serbia

The judicial reform began in Serbia, right after its transition from a socialist to a democratic government, in 2001, with the first set of laws. In 2006, the new Constitution of the Republic of Serbia was adopted together with the publishing of the National Strategy for Judicial Reform, while two years later in 2008 a number of laws were adopted such as:

- The Law on Seats and Territorial Jurisdiction of Courts and Public Prosecutor's Offices;
- The Law on Judges;
- The Law on High Judicial Council;
- The Law on Public Prosecution;
- The Law on the State Prosecutorial Council
- The Law on Court Organization (Zafirovska et al, 2018).

Under the Law on Court Organization adopted in 2008, there was a reduction in the number of courts in Serbia from 168 to 64 courts. This law established as well courts of general competence including basic courts, high courts and appellate courts (located in Belgrade, Novi Sad, Nish and Kraguejvac) and the Supreme Court of Cassation as the highest judicial body in the country (Zafirovska et al, 2018).

The new judiciary system began to function on 1st January 2010, and its objective was to redistribute the backlog of cases and the level of disparity among the so-called "urban courts" and the insufficiently exploited "rural courts". Under the new judiciary system, several bodies were created and started to function (Zafirovska et al, 2018).

The most important body is the High Judicial Council (HJC), an independent and autonomous body ensuring and guaranteeing the independence and autonomy of courts and judges, the functions of which were regulated under Article 156 and 157 of the Constitution. This body is composed of 11 members, three of which were ex officio members, consisting the President of the High Court of Cassation, the Minister of Justice and the President of the authorized committee of the National Assembly and eight electoral members elected by the National Assembly in compliance with the law. Out of those electoral members, six are judges holding the permanent position and two are notable lawyers with a minimum of 15 years of professional experience, of which one is a solicitor and the other is a professor at the faculty of law. The office term of each member is five years. Regarding who makes the appointment or dismissal of the judges, it is the HJC the one that had such a competence and also it makes a proposal to the National Assembly for the election of judges and so on.

On 22nd December 2008, when the Law on Judges was adopted, and together with the Constitution of the Republic of Serbia adopted in 2006, the procedure of the "general reappointment" of judges was envisaged, in which all judges that were near the end of their office term were allowed to participate. However, on the other side, new candidates were given the opportunity to apply for the open position as well, but despite this fact, the status of the candidates that were to be appointed for the first time was uncertain because they were put into a probation period of three years, which could also be transformed into a term-office following its expiration.

When we speak generally about the process of reappointment of judges in the Republic of Serbia, it was initiated by the new Law on Court Organization which envisaged the reduction of the number of courts that would automatically lead to reducing the number of judicial employees i.e. the removal of judges (Zafirovska et al, 2018).

The system for judicial appointment and dismissal in the Republic of North Macedonia

In the Republic of North Macedonia, there is no Vetting process due to the failure of its establishment but as a compensation, on May 2nd, 2018, the Assembly of the Republic of North Macedonia adopted the amending version of the Law on Courts and the amending version of the Law on the Judicial Council of the Republic of North Macedonia pursuant to the 2017-2022 Judicial Reform Strategy and Action Plan. The purpose of this amendment was to make a deep change in the system of evaluation and dismissal of judges. The amended Article 76 of the Law on Courts stipulates severe disciplinary offenses that initiate the procedure for establishing judicial responsibility on several grounds such as: if the judge has a membership in a political party, if the judge prevents the court of higher instances to oversee the judicial performance, if the judge uses his/her function and reputation for private interests, if the judge makes a severe disruption of public order consequently damaging the reputation of the court through establishing a final court decision etc (Zafirovska et al, 2018).

Conclusions and recommendations

When setting the standard for judicial recusal, it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done (R v Sussex Justices, Ex parte McCarthy ([1924] 1 KB 256, [1923] All ER Rep 233). This expresses why all forms of corruption and perceptions of such, whether in the form of bribery or bias, are so damaging to the judiciary, but preventing those forms of corruption will always be possible. One mechanism for doing that is through the Vetting process, a formal element established with the aim of identifying and removing all the judges and prosecutors that are responsible for any form of abuse, including corruption.

This formal process is present in several countries including the Republic of Albania, the Republic of Bosnia and Herzegovina, and the Republic of Serbia. Generally speaking, the Vetting process had a positive effect on detecting corruption, with the establishment of the Vetting bodies in the Republic of Albania including the Independent Qualification Commission (IQC) and the Appellate College, in the Republic of Bosnia and Herzegovina with the High Judicial and Prosecutorial Council and in the Republic of Serbia with the High Judicial Council. In the Republic of North Macedonia, the Vetting process wasn't functional due to the failure of its establishment but everything changed with the amendment of the version of the Law on Courts and the Law on the Judicial Council of the Republic of North Macedonia on May 2nd, 2018 based on the 2017-2022 Judicial Reform Strategy and Action Plan under the purpose of making a deep change in the system of evaluation and dismissal of judges.

However, dilemmas arise in the work against judicial corruption since efforts to impose accountability may undermine the independence judges need to do their work. On the other side, it is necessary to know that mechanisms are one side of the coin, but also initiative is another important element which countries of the Western Balkan need to take in order to upgrade the justice system.

It is important to have a thorough study from various academicians regarding Vetting in order to make a clarification about its process and by doing so the prominent intergovernmental bodies such as U.N and EU can publish it in order for the states to implement it and for the people to get to know with this important mechanism.

In order not to have a violation of Article 6 of ECHR regarding of the right to a fair trial within a reasonable time due to the reduction on the number of judges, it is important that before the reduction to be made, the states shall make a proper study regarding the number of the population and how much judges it need to have per 100.000 inhabitants, together with the impact that this reduction on the number of judges will have toward the citizens through analyzing the current ratio between the number of finished and unfinished cases. This study needs to be made in co-operation with the lawyers, prosecutors and judges, and afterwards necessary actions to be taken in line with the Article 6 of ECHR.

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