Disciplinary Liability of Judges – Prevention or Encouragement

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ABSTRACT

Present paper is intended to verify how strongly the current legislation of Georgia is focused on prevention of disciplinary misconduct of judges. The matter is discussed through the prism of the concept of general prevention (Die generalpräventive Lehre). After a consistent review of legislation, following conclusion should be made:

- The main idea of the general prevention – the threat of punishment – is diminished.
- Current Georgian legislation is less than focused on general prevention of disciplinary misconduct of judges;
- Current regulations make it even more difficult to prevent misconducts;
- A deep comprehension of the matter through the prism of concept of general prevention is needed in order to create new, more acceptable regulations.

The discussion offered in this paper has once again stressed on an ever existing problem: It is not necessary at all that a concept developed within certain field of law is used in a restricted way – only within the frame of that same field of law. It should be applied in process of comprehension of a problem that occurred within adjacent field of law if it is applicable considering its subject, problematics or/and methodological base.

KEYWORDS: Disciplinary misconduct, General prevention, Justice system

INTRODUCTION

For a long time, concepts from various disciplines are being imported into legal science and it makes surprise for no one. Legal scholars freely adopt ideas from psychology, psychiatry, sociology etc. and thus try to enhance the law. Keeping that in mind, it seems somewhat odd that concept developed through deep comprehension within certain field of law is almost ignored and hardly ever gets addressed within adjacent field of law despite that it might be applicable considering its subject, problematics or/and methodological base.

In legal literature, as well as in everyday life, the term "prevention" is usually associated with a criminal offense. This is natural since criminal offense is the most serious type of offenses and therefore its prevention is the number one task for the law. Therefore, it is no surprise that criminal law is the field of law that has primarily provided the deepest comprehension of the concept of prevention. Although this doesn't mean that only criminal offences deserve prevention. Disciplinary, administrative and sometimes even civil offences might bear significant social danger and thus it is important to prevent them as well. The most important is the level of damage that the
action might cause to public relations (material illegality).

Disciplinary misconduct of judges is no exception from this approach. It not only violates the interests of a party to the proceedings, but also jeopardizes the smooth administration of justice in general and affects public confidence in the court and its decisions. Considering such great importance, current Georgian legislation casts doubt on the approach chosen by the Georgian legislator. Present paper is intended to answer a question – how strongly the current legislation of Georgia is focused on prevention of disciplinary misconduct of judges?

METHODOLOGICAL BASE

It would be sensible to discuss the matter through the prism of the concept of general prevention (Die general-präventive Lehre) since that would allow to ask the most critical questions possible. Although it was developed within the framework of criminal law and primarily serves its purposes, its ideas can be easily modified to apply to the matter of disciplinary responsibility of judges.

The concept of the general prevention was developed by Feuerbach. This concept consistently argues that the goal of punishment should be prevention of future crimes rather than punishment (retribution) itself. General prevention consists of two main approaches. The first of them aims to bring a threat of punishment upon citizens, to give them a precise idea about the alleged legal consequences. It is crucial since people, who think of committing an offence although have not made the final decision yet, must reject their criminal ideas under the fear of alleged punishment (negative general prevention). According to this theory, every offence has its own psychological reason that stimulates one to commit it. This stimulus may be subdued if each and every citizen is aware that his/her offence will inevitably cause a punishment. For this reason this theory is referred as “theory of psychological enforcement” as well. It focuses on bringing legal peace, which is the main goal of law itself. The teaching relies upon the idea that the goal of punishment is to affirm the reality of the legislative threat and that without such affirmation the threat would be useless. It clarifies why the punishment should be used even if there is no risk of the recidivism. If a serious crime goes unpunished, people will inevitably grow expectation of impunity. The use of punishment is necessary to prevent such situation.

The second approach aims to generate legal consciousness within the members of society by implementing legal restrictions, so that they would not intend to commit crimes initially (positive general prevention). This contributes to formation of law-abidingness among citizens. The last must be achieved by saving and strengthening the trust to the legal order. The application of punishment should have the effect of social learning – people should learn loyalty to the law; Also the effect of trust – people should learn that the law is not only written on paper, but comes into action when needed. Loyalty to the law also is characterised by the effect of peace since law obedience makes people peaceful.

CURRENT LEGISLATION

According to paragraph 1 of article 7544 of Organic Law of Georgia on General Courts: “The Disciplinary Board shall make a decision on finding a judge guilty of committing a disciplinary misconduct, imposing disciplinary liability on him/her or on applying to him/her with a private recommendation letter if culpable commission of the disciplinary misconduct under this Law by the judge has been proved, by inter-compatible and irrefutable evidence collectively, during hearing a disciplinary case by the Disciplinary Board but, because of a minor significance of the infringement, insignificant degree of the guilt or other grounds (due to sensitivity of the matter or another reason, consideration of the judge’s personality), the Disciplinary Board considers inappropriate to impose disciplinary penalty on the judge and deems it sufficient to apply to him/her with a private recommendation letter.”

So, according to this legislative norm, a judge may commit a disciplinary misconduct and still go without dis-

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3 Henley V. (2013). Neglect of Judicial Duties and its Consequences. Conference on the Independence and Profession of Judges, Tbilisi, pp. 29-39.
4 The matter could be and should be comprehended through the prism of the concept of special prevention (Die spezialpräventive Lehre) as well. Although this goes beyond the subject of present paper and should be discussed in independent work.
5 Von Feuerbach P.J.A.R. (1798). Is the Purpose of the Punishment to Protect Against Crime and is Criminal Law the Law of Prevention. Library for Criminal Jurisprudence and Legal Studies.
6 Roxin, Arzt, Tiedemann. (2013). Introduction to Criminal Law and Criminal Procedural Law. 6th, new revised edition, C.F. Müller, p. 6. (In German).
7 Tskitishvili T. (2019). Punishment and Sentencing. Tbilisi, “Meridiani” publishing house, p. 27-28.
8 Roxin, Arzt, Tiedemann. The work cited, p. 6.
9 Turava M., 2011 Criminal Law. General Part. Concept of Crime. Tbilisi, "Meridiani" Publishing house, p. 45.
10 Tskitishvili T. The work cited, p. 31.
disciplinary penalty in case of:
1. Minor significance of the infringement;
2. Insignificant degree of the guilt;
3. Other ground (due to sensitivity of the matter or another reason, consideration of the judge’s personality).

This article obviously provides legal basis for defence. The fact of its existence in legislation is acceptable, since thanks to it not only grounds of liability are regulated but grounds of exemption from liability as well. Still, the particular types of defence need to be comprehended separately:

Defence number one – minor significance of the infringement – creates no principal controversies. Such defence serves the idea of differentiation of offences, which in turn should assist protection of the principle of proportionality. This is more than important when the action though formally illegal still does not cause significant enough damage to social relations. Such offence doesn’t bear significant enough social danger to make liability necessary.\(^{11}\)

Defence number two – insignificant degree of the guilt – already creates some controversy. Namely, the degree of guilt depends on how strong was one’s ability to act differently, how high was his/her level of freedom. The lower was the level of freedom that the offender had during commitment of the act, the lower will be the level of condemnation that the he/she should be subjected to.\(^{12}\) Although it is hard to imagine that one was fully exempted from liability for this reason. One may be fully exempted from liability only in case if one’s guilt was fully disproved. This is possible only if during the committing the offence one had fully lost the ability to act differently. Therefore, insignificant degree of the guilt may serve as a mitigating factor of liability but in no way as a defence.

Defence number three – other ground (due to sensitivity of the matter or another reason, consideration of the judge’s personality) – causes even more controversy. It substantially contradicts the concept of general prevention. The vague formulation grants the disciplinary board almost unrestricted right not to punish the judge they like. By all means, it is hard to imagine based on which legal categories one may argue that “sensitivity of the matter” may serve as a defence, i.e. judge has committed a disciplinary misconduct but he/she should go without penalty because the matter is "too sensitive." This causes only astonishment.

As for the formulation “another reason, consideration of the judge’s personality”, it directly indicates that the decision may be prejudiced. It would be unacceptable if one argued that the personality of the judge is mentioned here in order to apply to the principle of individualization. The factor of personality of the offender must be already taken into account on the stage of guilt. Accordingly, this matter is already taken into account within the second defence described in paragraph 1 of article 7544 which regulates the matter of guilt. Moreover, the personal factor in this sense may serve as a mitigating factor of liability but by no means as a defence.

It becomes rather apparent that the formulation of paragraph 1 of article 7544 serves one purpose – to minimize the requirements of argumentation of decisions of the disciplinary board in order to enable it not to punish the judge they like. Apart from voluntary decisions and the danger of corruption that it produces, the main idea of the general prevention – the threat of punishment – becomes diminished. The legislator directly indicates that in case of disciplinary misconduct the board is able not to penalize the judge and do it without any real argumentation. With this in mind, a judge has full reason to assume that if he/she commits a misconduct, he/she will have a real chance to go without penalty. Instead of creating a stiff expectation on irreversibility of legal consequences, paragraph 1 of article 7544 creates expectations that those legal consequences can be avoided. The “psychological enforcement” is not provided, the psychological stimulus is not subdued. On the contrary, the judge gets additional psychological stimulus to commit an offense. Consequently, instead of prevention, the misconduct is encouraged.

**CONCLUSION**

To sum up, the following conclusion should be made:
- Current Georgian legislation is less than focused on general prevention of disciplinary misconduct of judges;
- Current regulations make it even more difficult to prevent misconducts;
- A deep comprehension of the matter through the prism of concept of general prevention is needed in order to create new, more acceptable regulations.

The discussion offered in this paper has once again stressed on an ever existing problem: It is not necessary at all that a concept developed within certain field of law is used in a restricted way – only within the frame of that same field of law. It should be applied in process of comprehension of a problem that occurred within adjacent field of law if it is applicable considering its subject, problematics or/and methodological base.

\(^{11}\) Tsereteli T. The work cited, pp. 49-64.
\(^{12}\) Ugrekheidze M. (1978). The Significance of Level of Guilt for Individualization of Punishment. Soviet Law, №6, p. 46.
NOTES:

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2. Tsereteli T. (2007). Problems of Criminal Law. I Vol. Tbilisi, “Meridiani” publishing house, pp. 22-25. (In Georgian)
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4. The matter could be and should be comprehended through the prism of the concept of special prevention (Die spezialpräventive Lehre) as well. Although this goes beyond the subject of present paper and should be discussed in independent work. (In German)
5. Von Feuerbach P.J.A.R. (1798). Is the Purpose of the Punishment to Protect against Crime and is Criminal Law the Law of Prevention. Library for Criminal Jurisprudence and Legal Studies. (In German)
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9. Turava M., 2011 Criminal Law. General Part. Concept of Crime. Tbilisi, “Meridiani” Publishing house, p.45. (In Georgian)
10. Tskitishvili T. The work cited, p. 31. (In Georgian)
11. Tsereteli T. The work cited, pp. 49-64. (In Georgian)
12. Ugrekhelidze M. (1978). The Significance of Level of Guilt for Individualization of Punishment. Soviet Law, №6, p. 46. (In Georgian)
მხოლოდ საზოგადოების მინიჭებით დანერგვის შემთხვევაში დაფიქცია, დაგეგმილი, ადგილობრივი უსაფუთო და შიგნის სამოქალაქო საბრძოლოფუძთავი გამორჩეულია ქანების ძირითადი პრევენციაში. მოსამართლეთა შემთხვევაში სასჯელი და მისი შეფარდება ამომოქმედებით ქმედებების, რათა მიზანია ისტორიული მოსალოდნელი მათში (ბინარული) ბრძოლის ფონზე.

2 რუტონი წ. (2007). საბრძოლო პრევენცია. I წერილი. თბილისი, გამოქვეყნებული ქართულად, გმ. 22-25.
3 ჰენლი ვ. (2013). ჯანმრთელობის უსაფრთხო და ჯანმრთელობის მიზანი. თბილისი, გამოქვეყნებული, გმ. 29-39.
4 საბრძოლო პრევენცია აღორძენებული და სახელი სპეციალური პრევენციის შეფარდების თეატრი (Die spezialpräventive Lehre) ზემოქამე, თუმცა ადგილობრივი ნაკვთის ნაშრომისას მონაწილი, წყვეტული და გამოსახული სახელი.

5 Von Feuerbach P.J.A.R. (1798). Ist Sicherung vor dem Verbrechen Zweck der Strafe und ist Strafrecht Präventionsrecht. Bibliothek für die penilne Rechtswissenschaft und Gesetzgebung.
6 Roxin, Arzt, Tiedemann. (2013). Einführung in das Strafrecht und Strafprozessrecht. 6., neue bearbeitete Auflage, C.F. Müller, S. 6.
7 რუტონი წ. (2019), სახელი და სახელობა. თბილისი, გამოქვეყნებული ქართულად, გმ. 27-28.
8 Roxin, Arzt, Tiedemann. სპეციალური სახელობა, თბ. 6.
9 ფუტი წ. (2011). სახელი სპეციალური სახელობა. თბ. 6.
საგარეო მატერიალში არაობით პასუხისმგებლობა არსებობს თავისუფალ გათვალისწინებით, რომ მთლიან მოთამაშეთა ჰქონდეს შეუძლებლობა საკმარისად ღირსშესანიშნავ თავისუფალ გადახურვის მოსამსუბუქებებთა პასუხს მოითხოვა გარემოებას იმ შემთხვევაში, როდესაც თავისი მოთამაშეთა გარემოება მზად იყო გამორიცხვის პასუხისმგებლობის სახით ითვლილი, რომელიც არსებობს თავში გამოირჩევა სასჯელის ინდივიდუალიზმი ზაცითა ისათვის.

10 მოხუციშვილი ქ. სამართალმტკიცებულო, გვ. 12; ზ. სამართალმტკიცებულო, გვ. 31.

11 იხ.: უგრეხელძე მ. (1978). ბრალის ხარისხის მნიშვნელობა, წ. ახალი კურსული, გვ. 12.

12 იხ.: წერეთელი თ. დ. დ. (1978). პრაქტიკული სასჯის წრობები, წ. ახალი კურსული, გვ. 49–64.
ლიც - პირქვებიდან არ დაკვირვების მიერ საფუძვლო მონაწილეობა. თავისთან ედა, „საქართველოს დემოკრატიის“ გარშე პირქვებიდან გამოიყენებული გადახურვის შემ გვერდობა იქნა. იქნა, რაც მათთვის გადატვირთა ვიდა, მაგრამ საქართველო მიერ დაბნენ ფლაგების ავტორობის, რომ პირქვები იმუშავება არ უნდა დახვეწილა.

რა მოგზაურობა - „საქართველოს პოლონურ ფორმატიდან გამომდინარეობა“ - გან პირველად, მიგზაური იმისათვის, რომ სტაბილურად გადახურვალურად შეიხებიათ იმისა, აქვს მოთხოვნის გამომდინარეობის პირველად, რომ ამ თანამედროვე პროცენტში მოთხოვნის შემთხევაში რაღაცი შეიძლება გზავნილიყო. გადახურვის პირობები, როგორც თანამედროვე, ალო გადახურვის შენობა 5744-ე ქვესახლო პირობის ოთხად გადაწყვეტა, მოქალაქ რიგი აქვს. რა მოთხოვნის, პირობების მერვე მკვლევარ თუ შეიძლება იქნა სხვა შემთხვევაში ბაზარში, მაქსიმა.

დააკისროდ, ისე რომ იყო 7544-ე ქვესახლო ამ პროცეს სტატუსი პროცეს უფლება ხელს ავტორობა მეტი სასჯელი, ან მოსასარგებლო თანახმად. გადახურვა იმისათვის, რომ 7544-ე ქვესახლო პირულ პერიოდში გახდეს ერთხელ და თუ პირველად გახდეს აქ, ისე რომ იქნება ან აქ, არ ჰქონდა მისი არსებული თავისთაშორის მომართვის. ამ შემთხვევაში გადახურვის შემთხვევაში მოსამართლემ იქნება ზემო მინათუ.

სამუშაო

"LAW AND WORLD"