

INTRODUCING PROCEDURAL GUIDELINES IN UKRAINE AND GREECE

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Procedural Guidelines are a means to enable judges and court staff to manage cases efficiently whilst upholding fair trial rights, by imposing limitations on parties, proportional to case characteristics. In his article, Dr. Langbroek reports about the successes and failures of introducing this concept in some courts in Ukraine and Greece.

1. Introduction

Since 2019, the Centre for International Legal Cooperation in The Hague has been organizing several projects that aim, among other things, to promote the idea of procedural guidelines in the judicial organizations of Ukraine and Greece.¹ Procedural guidelines are a result of cooperation between judges, in which the BAR is also involved. As far as the procedural guidelines are concerned, both projects were led by Dutch senior judge Esther de Rooij. In this article, I outline some of the different backgrounds of the judicial organizations of Greece and Ukraine and report on the success and failure in both projects.

2. Ukraine

Independent and impartial justice in Ukraine has long been difficult to achieve. Judges could buy a position (call it goodwill) or an oligarch would get someone a post. There had to be something in return. And that goodwill had to be recouped. Think of amounts between 50,000 and 400,000

Euros. Law firms also cooperated. In this sense, a lawsuit of any importance could be purchased.

Since December 2015, a National Anti Corruption Bureau and a High Anti Corruption Court have been established and in operation. An electronic system has been set up, in which civil servants and office holders must declare their property. This system performs automatic checks with, among other things, the population register, the land register, etc. And the data is accessible to the public and the most important tool in the fight against corruption.² Judges should also be able to declare their ownership in this way. So, if you own three houses, an apartment, a Tesla and a collection of Rolexes, and you cannot prove that you obtained them in a normal way, for example considering your income history, then you cannot be reappointed as a judge. More than 6,000 judges and candidates for judges' posts also had to undergo a substantive assessment to requalify. Of the nearly 9,000 judges, 3,000 have resigned or been dismissed. In addition, the High Qualification Commission of Judges of Ukraine has launched a special evaluation (vetting) and appointment procedure for the members of the Supreme Court and the High Council of Justice. This involves working with the Venice Commission and a group of international experts to arrive at a selection

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¹ The projects in Ukraine (Odessa, and later in Kyiv) are Social Transformations projects, funded by the Ministry of Foreign Affairs, the project in Greece was funded by the European Commission.

² Nicholas Dam, 1/26/2021, Reform-of-Asset-and-Interest-Disclosure-in-Ukraine. <https://thedocs.worldbank.org/en/doc/457791611679267058-0090022021/Reform-of-Asset-and-Interest-Disclosure-in-Ukraine> (all websites in the footnotes were visited between 27 March and 10 April 2023).

of fair judges. NGOs (Non-Governmental Organisations) play a monitoring and driving role, closely monitoring the steps taken and commenting on the degree of transparency – including during the war.³ But opposition to anti-corruption reform is extremely tough.⁴ You can set up an anti-corruption section within the Public Prosecution Service, but those people can also be bribed – or a media campaign is set up to make it plausible that effectively operating corruption fighters are themselves corrupt, including anti-corruption NGOs.⁵ Much of the media in Ukraine is in the hands of oligarchs. In the meantime, members of NGOs fighting corruption must also declare their own assets. And the Constitutional Court found in 2020 that the obligation of civil servants to show their assets because of public accessibility violated the Constitution.⁶ In this way, some members of the Constitutional Court also tried to escape prosecution. Quite a few of the pending cases before the High Anti-Corruption Court are obstructed by lawyers with deferral requests and even with requests that the court had already provided for – or they simply don't show up. The High Anti-Corruption Court and the Ukrainian legal profession are hostile to each other. A recent 'incident' was the arrest of the newly appointed president of the Supreme Court of Ukraine, Vsevolod Kniaziev, on May 18, 2023. He appeared to have cashed three million dollars in return for a beneficial verdict for a mining company. He had been intensively vetted by the anti-corruption committee, everybody was impressed by him, but following his appointment he decided to take better care of himself in the usual way. This came to light by careful observation of the Anti-Corruption Bureau in Kyiv. In the meantime, a new president has been appointed (Stanislav Kravchenko) who earlier hadn't made it through the vetting-process... Apparently, corruption is so deeply embedded in Ukrainian society that it is difficult to find 'clean' persons who are capable...

In the project in Odessa Oblast, an attempt was made to make the judges discover whether and how they could get a better grip on their work by developing procedural arrangements (we call them guidelines) for the different

jurisdictions. To this end, they worked together with an NGO (Second of May), which monitored the project. It was also surprising that the local bar cooperated with this project and contributed to the development of these litigation arrangements, thanks to the efforts of a lawyer who was also a member of parliament. Andrii Dryschliuk, the then president of the Odessa Court of Appeal, also played a pioneering role. It was noticeable that judges were hardly used to cooperating but enjoyed discussing cases and possible procedural guidelines with each other. This was also supported by the presidents of the first instance courts in Odessa Oblast.

One of the problems that was discussed is that in (criminal) cases involving a powerful politician or a powerful businessman, judges tend to duck away. They prefer to throw the hot potato over the wall to a colleague. And then every excuse is valuable. This also applies to challenging of judges, which also delay a case, and lawyers there often want to postpone the hearing of a case. Arguments that are used include: *the judge was a fellow student, the judge has previously been in a case in which I was involved, the judge was a colleague in a previous life, or the judge is a customer of the organization that filed a case against me*, etc. These arguments have been declared invalid in the procedural guidelines in the Odessa Courts. But they are also about the role of lawyers in the planning of cases, of postponements and so on. They indicate when postponement requests are not honored. The basic principle is that if you as a lawyer cannot appear at a scheduled date/time, you should send a colleague, unless unforeseeable circumstances arise (and you must then prove them). Furthermore, guidelines are about time limits, about evidence, about speaking time and about the reading of the verdict (statements were read out in full!) in order to use court capacity efficiently. In Odessa, judges are now working with these procedural guidelines, to their satisfaction. To make this possible, hierarchical security was very important. Before participating, they wanted to make sure that supervisors of the Supreme Court of Justice agreed to this experiment – with a

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3 Vgl. Max Bader, Oksana Huss, Andriy Meleshevych, Oksana Nesterenko, Civil Society Against Corruption in Ukraine: Pathways to Impact, Kyiv-Mohyla Law and Politics Journal 5 (2019) p. 2-35; DeJuRe, Judicial reform in Ukraine <https://en.dejure.foundation>;

4 Bij voorbeeld: John Lough and Vladimir Dubrovskiy, Are Oekraïne's Anti-Corruption Reforms Working? Russia and Eurasia Programme | November 2018 <https://euaci.eu/what-we-do/resources/are-Ukraines-anti-corruption-reforms-working-research-paper>). Transparency International, Report Based on the Monitoring of the High Anti-Corruption Court, April 1 – July 1, 2021 (euaci.eu).

5 Cf. <https://antac.org.ua/en>.

6 <https://ti-Ukraine.org/en/news/breaking-constitutional-court-effectively-terminates-e-declarations/>; <https://antac.org.ua/en/news/constitutional-court-destroyed-e-declarations/>.

letter, a signature, and a stamp.

The current situation of judges in Ukraine is one of uncertainty and chaos in the highest institutions; There is still a hierarchy, but it has changed and become uncertain due to the many changes and redundancies that have been made in recent years. In these circumstances, collaboration with colleagues in the development and application of guidelines to get a grip on case management is an attractive prospect. The same project has therefore started this year in Kyiv. The extent to which this has a chance of success depends not only on the course of the war, but also on the success or failure to gain support from the legal profession and to link this method with the newly established institutions of the judicial system in Ukraine.

3. Greece

The project in Greece aimed to organise statistical data collection, improve the training of judges, and stimulate cooperation between judges by drawing up procedural arrangements. Unfortunately, that project was sabotaged in terms of cooperation between judges from different sides – from the Athens court, and by the local judges’ association and the President of the Greek Supreme Court (Areios Pagos), Maria Georgiou.⁷ Only the family judges of the Pireaus District Court and the prosecutors of Athens and Pireaus were willing to join us. For the judges in Pireaus, their cooperation soon led to a brief set of guidelines regarding the planning of cases at trial and regarding the parties’ limitations on the conduct of the proceedings. The lawyers we spoke to during the preparation of our project were very much in favour of improving case planning and communication about it at the Athens District Court. The Athens Court is the largest court in the country where eight hundred of the 2900 Greek judges work and that is where most of the cases are served, because half of the Greeks live in the Athens region. Cooperation between the bar association, the court and the public prosecutor’s office to improve planning and turnaround times in civil and criminal cases is absent, the president of the Athenian Bar Association had not spoken to the administration of the Athens court for five years, and the

court still did not want it.

Anyone who reads the Greek Constitution will be impressed by the strong rule of law position of the judges and prosecutors and of the judicial system. But if you then delve into the regulations⁸, you will discover that many formal competences are and therefore much power is concentrated in the Greek Supreme Court (*Areios Pagos*). It is not only the highest court of the land, but it is also responsible for the inspection of judges and courts. Presidents and the Head of the Public Prosecutor’s Office and Advocates-General in the Areios Pagos and the Council of State are selected and appointed by the Government (Art. 90 Grw). In practice, Presidents to the Supreme Court and the Council of State are appointed when they are sixty-five or nearly 66, so their term ends when they are 67 – and retire. On this point – the government’s influence on the selection of candidates for these posts – the European Commission and GRECO have criticized the Greece for quite some time already, but without result.⁹

A large proportion of the judges in the Areios Pagos is charged with inspection duties, there are more than two hundred courts in Greece. Inspectors are appointed by lot and are assigned at a court for one year. In the long run, inspection results determine the promotion that judges can make. In the highest instance, a court within the same Supreme Court also decides on disciplinary sanctions and promotions on appeal. The criteria by which individual judges are assessed are not very clear. Inspectors do not cooperate with each other. In addition, attention is paid to the enormous backlogs in Greek courts. This is seen not so much as an organizational problem, but primarily as an individual judicial responsibility. At the same time, the Greek legislator believes that traffic violations should be punished by judges. All kinds of other minor violations (such as exceeding the maximum number of seats on a terrace, or not mentioning a product name in a market stall) must also be dealt with in this way. As a result, the public prosecutor’s office and the courts are flooded with criminal

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7 Several judges of the Areios Pagos and a vice president had indicated in the fall of 2020 that they supported this project.

8 Code of courts organisation and status of judicial officers.

9 European Commission Staff Working Document, 2020 Rule of Law Report. Country Chapter on the rule of law situation in Greece SWD (2020) 307 final; 2021 Rule of La Report, Country Chapter on the Rule of Law situation in Greece SWD (2021) 709 final; 2022 Rule of La Report, Country Chapter on the Rule of Law situation in Greece SWD (2022) 508 final; GRECO, Fourth Evaluation Round; Corruption prevention in respect of members of parliament, judges and prosecutors, Addendum To The Second Compliance Report Greece, Strasbourg, 21 – 25 March 2022, p 4, nrs 18-22

cases, while they are not equipped to handle them properly. One problem is that Greece has the highest density of lawyers in the EU (almost four hundred per 100,000 inhabitants, while their fee system encourages them to carry out as many actions as possible. Judges in Athens are so busy with requests for adjournment that they do not have enough time for the substantive treatment of cases. Scheduling hearings often results in chaos, because lawyers do not adhere to speaking times. There is no electronic communication about changed hearing schedules, which means that lawyers often have to wait with their party in the corridor or on the grounds of the former barracks in which the court is located.

It often happens that a disciplinary complaint is filed by a lawyer against a judge, which must then first be assessed by an inspector. The vast majority of these complaints are dismissed untreated, but about five judges a year are dismissed for dysfunction. In December 2021, there were seven, following a call by Maria Georgiou¹⁰, the then president of the Areios Pagos appointed at the end of June 2021, to report the dysfunction of judicial colleagues to her through the hierarchy. Also Mr. Tselipos, the benevolent president of the Piraeus court at the time, threw in the towel for our project with reference to this letter.

Greece is lagging behind in terms of court administration and judicial organisation. Her ranking in the World Justice project is the lowest in the EU.¹¹ Other NGOs also highlight the inadequate state of the rule of law in Greece.¹² Greece has hardly any statistics on the functioning of ordinary courts, the data they provide for CEPEJ and the EU Justice Scoreboard are very limited, transparency is hard to find, the courthouses in Athens and Piraeus are abominable, IT of any significance

was absent from civil and criminal justice in mid-2022, and appointments to leadership positions are for a limited time (2 years) and not based on management talent or organizational experience.

Recent examples of hierarchical manipulation in Greece include the prosecution of Andreas Georgiou, the former president of the National Statistical Office (ELSTAT), who in 2011 announced the true extent of Greece's budget deficit, for harming the country's interests.¹³ The head of the Greek Public Prosecution Service – a member of the Areios Pagos – has ordered this prosecution three times, even after repeated acquittals. His former colleagues have also filed defamation lawsuits against him. His case was brought before the ECHR in Strasbourg last January. The prosecution for human smuggling that has been initiated against volunteers who receive washed-up migrants on the islands of Lesbos and¹⁴ more recently of Kos¹⁵ is undoubtedly also known. How can that be when Greek prosecutors are as independent as judges? It has the distinct smell of underhand political interference. Such court proceedings take years: in Greece, apparently, you instigate court proceedings, not to win your case, but to harass your opponents for as long as possible.

In the 2022 Rule of Law Report, the European Commission welcomed some ongoing reforms – especially new regulations and the creation of a justice statistics office, but it is not clear to what extent these will benefit the functioning of judges and judicial organisations. They refer to amendments to the Law on the Judicial Organisation, the Law on Court Officials and procedural rules. The

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10 www.areiospagos.gr/anakinoseis/%CE%95%CE%A0%CE%99%CE%A3%CE%A4%CE%9F%CE%9B%CE%97%20%CE%A0%CE%A1%CE%9F%CE%95%CE%94%CE%A1%CE%9F%CE%A5%20%CE%91%CE%A1%CE%95%CE%99%CE%9F%CE%A5%20%CE%A0%CE%91%CE%93%CE%9F%CE%A5%20%CE%A3%CE%A4%CE%9F%CE%A5%CE%A3%20%CE%94%CE%99%CE%9A%CE%91%CE%A3%CE%A4%CE%95%CE%A3%20%CE%A4%CE%97%CE%A3%20%CE%A7%CE%A9%CE%A1%CE%91%CE%A3%20%CE%9A%CE%91%CE%99%20%CE%94%CE%99%CE%9A%CE%91%CE%A3%CE%A4%CE%99%CE%9A%CE%9F%CE%A5%CE%A3%20%CE%A5%CE%A0%CE%91%CE%9B%CE%9B%CE%97%CE%9B%CE%9F%CE%A5%CE%A3.FR10.pdf

11 https://worldjusticeproject.org/sites/default/files/documents/Greece_2021%20WJP%20Rule%20of%20Law%20Index%20Country%20Press%20Release.pdf

12 Joint Civil Society Submission to the European Commission on the 2023 Rule of Law Report, January 2023, (Vouliwatch, Greek Council for Refugees (GCR), Refugee Support Aegean (RSA), HIAS Greece, Generation 2.0 – Second Generation / Institute for Rights, Equality and Diversity, Reporters United);

13 Miranda Xafa, 26 August 2021 <https://www.world-economics-journal.com/Papers/The-Case-of-Andreas-Georgiou-A-Travesty-of-Justice.aspx>.

14 <https://www.hrw.org/news/2018/11/05/greece-rescuers-sea-face-baseless-accusations>.

15 <https://www.hrw.org/news/2023/01/16/sea-rescuers-still-waiting-justice-greece>

2020 Rule of Law report still wrote about the poor quality of Greek regulations as ‘polynomia’ and ‘kakanomy’¹⁶, and I do not believe that all these new rules suddenly make that organisation function properly, and they are also so detailed that they are difficult to manage. Undoubtedly, the Greek judiciary meets the strict standards of the Venice Commission when it comes to the rules that protect judges from outside influence.¹⁷ But the hierarchical arbitrariness to which Greek judges can be subjected internally prevents them from standing up in their court organizations for the improvement of practices that can lead to more effective case management, and to better turnaround times.

4. Concluding

At a time when the European Union is placing much emphasis on the importance of the rule of law, the example of Greece shows that mere attention to the outside of judicial independence is not enough. The Greek judiciary lacks internal cooperation, the relationship with the other state powers is mainly controlled by those other state powers and they do not seem to want the development of a robust judiciary. I suspect that in interactions with the Council of Europe and the European Commission, they will say ‘yes’ and do ‘no’. I am referring to a member of the Eurogroup in the European Union!

For Ukraine, I hope that the current opportunities for the development of the judicial system will lead to results in about 5-10 years’ time. That is why the project for procedural guidelines in Ukraine deserves broad support and, in the not-too-distant future, an embedding in permanent Ukrainian justice policies. This means that local cooperation between judges of courts and tribunals will eventually have to be embedded in a formalised cooperation between the High Council of Justice, the Ministry of Justice and parliament, preferably, but not necessarily in legislation. It may help if these developments are monitored by NGOs, and it will take effort, resolve and endurance to put an end to corruption practices – but first this horrible war must be won.

16 European Commission Staff Working Document, 2020 Rule of Law Report. Country Chapter on the rule of law situation in Greece SWD (2020) 307 final, p. 10.

17 CDL-AD (2010)004-e Report on the Independence of the Judicial System Part I: The Independence of Judges adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010).