

THEMIS COMPETITION 2022

EJTN

SEMI-FINAL D: Judicial Ethics and Professional Conduct

12-15 July 2022, Barcelona



TEAM GREECE

The lingering shadow of the judge:

Contemplating on the judicial ethics regarding the former judge

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Introduction

Adamandios Korais, a Greek scholar and pioneer of the modern Greek Enlightenment, in an attempt to set the ethical compass for the judiciary of the time, held the view that judges must be guided not only by customs and legal texts but, above all, by their rational thinking.¹ Since his time, the principle of the rule of law rendered the role of the judiciary notably more important, due to the fact that it is the judiciary that guarantees justice, in a state governed by law.² Even further, nowadays, judges are considered the public face of the rule of law and are expected to be independent and free from external pressure or control by the other branches of government.³ Despite the evolution of the role of the judiciary the concern regarding the principles judges should be guided by, remains the same. To this end, Codes of Judicial Conduct were drafted, aiming at providing, through non-binding provisions, guidance to judges⁴ and offering to the judiciary a framework for regulating judicial conduct.⁵

Regardless of the codification, it is common knowledge⁶ that many aspects of the life as one knew it, will change once they succeed in becoming a judge⁷. Yet, it is doubtful whether that same person has even considered that those changes may not cease even after they leave the bench. It has been said that “a judge is still a judge when they leave the court, as a person is still part of a family when they depart from home every morning”⁸, but can this statement include those who left the judiciary and if it does to what extend?

In this paper, we aspire to approach the effects of being a judge on the life of the former member of the judiciary and answer the ever-rising question, mentioned

¹ Adamantios Korais, 1748-1833, Greek scholar.

² Rafał Mańko, European Parliamentary Research Service, *Protecting the rule of law in the EU Existing mechanisms and possible improvements*, PE 642.280, November 2019.

³ Venice Commission Report on the Rule of Law (CDL-AD(2011)003rev), § 54.

⁴ See, relevantly, Opinion No 3 of the CCJE to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, CCJE (2002) Op. N° 3, 19.11.2002, available at: http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp.

⁵ V.Androulakis, “*Judicial Ethics*”, “*Justice and Society*” Conference, November 2019, co-organized by the Administrative Courts of Thessaloniki, the Municipality of Thessaloniki and the Bar Association of Thessaloniki, held in Thessaloniki.

⁶ Kansas Code of Judicial Conduct, Canon 2, Commentary (2004 Kan. Ct. R. Annot. 540).’ 280 Kan. at 272-73, “A judge must therefore accept restrictions on the judge’s conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly”.

⁷ See The Bangalore Principles of Judicial Conduct, adopted in 2002, available at: www.unodc.org.

⁸ Cynthia Gray, *An Ethics Guide for Judges and Their Families*, Library of Congress Catalog Card Number: 00-00000 ISBN 1-928919-06-5 (2001), at. 1.

above, regarding whether or not a judge will always, active or not, be a judge. The first chapter (I) briefly refers to the provisions of the Codes of Judicial Conduct regarding the former members of the bench in both European countries and worldwide. The second chapter (II) aims at casting light on the effects that the existing framework of judicial ethics can have on the main aspects of the life of the former judge. In the last chapter (III) we have gathered our final thoughts, conclusions, as well as, our proposition on the extent that the ethical boundaries should have on the no longer serving judges.

I. The provisions of the Codes of Judicial Conduct regarding retired judges.

Even though most European countries have drafted Codes of ethics for judges,⁹ only a few of them include provisions with directions for retired judges.¹⁰ The most comprehensive of these Codes, regarding the obligations of the former judges, is the one drafted by the Court of Justice of the European Union (herein CJEU). The former members of the CJEU are, of course, still subject to the ethical standards laid down by the Treaties,¹¹ the Statute of the Court of Justice of the European Union¹² and the Rules of Procedure of the Court of Justice,¹³ but they are also governed by the Code of Conduct for members and former members,¹⁴ adopted jointly by the Court of Justice and the General Court on the 30th of September 2021. According to this Code former judges, above all else, continue to be bound by the obligations of integrity, dignity, trust and confidentiality.¹⁵ To achieve this, the Code sets in place a number of specific obligations. To start with, former members are excluded from cases which were pending before the court or tribunal of which they were a member when they ceased to hold office, as well as, from cases in any way connected with cases, which they have dealt with as judge. In addition, for a period of three years from the date of their ceasing to hold office, former members cannot act as representatives of parties, in either written or oral pleadings, in cases before the Courts that constitute the Court of Justice of the

⁹ With the exception of Finland, Sweden, Poland that do not currently have a Code and Luxemburg, where the draft is pending (Draft Law no. 6030). Also see, relevantly, the Third Interim Compliance Report for Luxemburg carried out by GRECO, Strasburg, 22-25th of March 2022, available at: <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a5f164>.

¹⁰ Codes of EU countries with no reference to retired judges: 1. Denmark, Code of judicial principles, adopted at the general meeting of the Association of Danish Judges on 24 October 2014, 2. Cyprus, Guide to Judicial conduct, adopted by the Supreme Court of Cyprus on Sept. 2020, 3. Lithuania, Code of ethics of the judges of the republic of Lithuania, adopted by a general meeting of the Lithuanian judges on June 28, 2006, 4. Hungary, Code of Judicial Conduct, adopted in the meeting of the National Judicial Council, on 10 November 2014, 5. Malta, Code of Ethics for the Judiciary, as amended in 2010 and adopted by the Commission for the Administration of Justice, 6. Slovakia, Code of Conduct, adopted by the Judicial Council of the Slovak republic on December 17th 2015, 7. Slovenia, Code of Judicial Ethics, adopted by the Ethics and Integrity Commission, on January of 2017, 8. Bulgaria, Code of Ethics of Bulgarian Magistrates, adopted by the Supreme Judicial Council in 2008, 9. Romania, Deological Code for judges and prosecutors, adopted by the Supreme Council of Magistracy in 2015, 10. Estonia, Judges' Code of Ethics, adopted by the third regular court en banc on 13 February 2004, 11. Austria, Declaration of Wels, adopted by the Austrian Association of Judges on November 7, 2007, 12. Netherlands, NVvR Guide to Judicial Conduct of the Dutch Judges Association, adopted by the Presidents of the Courts and the Council for the Judiciary jointly in 2011, 13. Ireland, Guidelines Concerning the Judicial Conduct and Ethics, adopted by the Judicial Council on February 4th 2022.

¹¹ In particular: Art. 253, 254, 257 and 339 of the Treaty on the Functioning of the European Union.

¹² Available at: [tra-doc-en-div-c-0000-2016-201606984-05_00.pdf](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:tra-doc-en-div-c-0000-2016-201606984-05_00.pdf) (europa.eu).

¹³ Available at: [RÈGLEMENT DE PROCÉDURE DE LA COUR DE JUSTICE](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:R%CC82GLEMENT%20DE%20PROC%CC82DURE%20DE%20LA%20COUR%20DE%20JUSTICE.pdf) (europa.eu).

¹⁴ Available at: [EUR-Lex - C:2021:397:TOC - EN - EUR-Lex](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:EUR-Lex-C:2021:397:TOC-EN) (europa.eu).

¹⁵ Art. 9 (1).

European Union. Before the three-year time limit is up, former members can oversee cases (other than those mentioned above) as agent, counsel, adviser or expert or provide a legal opinion or serve as an arbitrator, provided that they comply with the general duties of dignity and integrity.¹⁶

Mirroring the ethical standards of the CJEU Code, only a few months ago,¹⁷ the Hellenic Council of State published their own Code of Judicial Conduct,¹⁸¹⁹ which held that its provisions apply the same on retired judges.²⁰ The Greek Code proceeded to specifically note that former judges should continue to demonstrate behaviour compatible with the prestige of the position they held,²¹²² which, as it is further explained, includes avoiding undertaking, as a counselor or lawyer, cases in which they had participated during their active period or cases directly related to them, as mentioned in the CJEU's Code,²³ but also abstaining from actions that could give the impression that they are exploiting information acquired while on duty, which they should generally abstain from discussing.²⁴ It is noteworthy that the Code emphasizes on the "image" and the need to avoid using the prestige of the position they held or the acquaintances with court officials or judicial staff in such a way as to place themselves in an advantageous position over other lawyers or to question the prestige and impartiality of their former colleagues.²⁵ Despite the fact that various ethical issues are tackled in the Greek Code, there is no provision regarding the return of the former judge to private practice. As mentioned above, the Code includes some prohibitions regarding

¹⁶ Art. 9 (2) (3).

¹⁷ The effort started with the decision (no. 428/21.11.2019) of the former president of the Council of State, A.Sakellaropoulou.

¹⁸ Code of Ethics for the Judges of The Hellenic Council of State, available at: <http://www.adjustice.gr>.

¹⁹ It is noted that one year prior the Hellenic Council of Auditors published their own Code of Judicial Conduct, which held no provisions for retired auditors, see decision no. ΦΓ8/55595/9.11.2020, published in the Official Government Gazette 4942/B/9.11.2020.

²⁰ Supra note 18, under 5.

²¹ Supra note 18, Part 1, Chapter 3.

²² Similar provisions can be found: a. under II, at 14, Code of Ethics for the administrative judges of France, b. under III.13, German Code of Conduct for the Justices of the Federal Constitutional Court.

²³ Similar provisions can be found: a. under III.14, German Code of Conduct for the Justices of the Federal Constitutional Court, b. in art. 8, Croatian Code of Judicial ethics.

²⁴ Supra note 18, Part 1, Chapter 7.

²⁵ V.Faitas, judge at the Greek administrative courts of appeal, "My proposal for the Code of Conduct", submitted before the General Assembly of administrative judges on 5.11.2021, available at: www.ende.gr.

the cases the former judges turned lawyers can try, yet there is no “cooling off” period or other prohibition or direction regarding their return²⁶.

On the contrary, in many European countries there are elaborate provisions regarding the professional life of the former judge. In Italy, former judges are expected to wait at least a year before they can apply to be registered as lawyers, but when it comes to trying cases before the courts they were a part of previously the time of abstention goes up to three years.²⁷ A stricter provision can be found in the French Code of Conduct since it prescribes for administrative judges to seek for permission from the ethics committee²⁸ and otherwise abstain from exercising any occupation or private business for three years after retirement.²⁹ Even after this period and for up to five years, former judges cannot try cases before the courts they were once a member of.³⁰ To top the previous provision, when it comes to Supreme Court judges that have presided over the Court for more than three years the “cooling off” time doubles and for a period of ten years after the judge retires, he/she cannot return to private practice.³¹ In addition, the relevant provision of the German Code of Conduct³² prescribes that former judges of the Federal Constitutional Court of Germany can never represent anyone before that same court. These former judges can practice law only in lower courts, one year after their retirement.

Furthermore, noteworthy are the provisions regarding the disciplinary procedure concerning former judges.³³ Ceasing to hold office is, most of the time, the endpoint of any disciplinary liability of the judge, since the alleged misconduct regards

²⁶ There is one single reference in Art. 27 (1), law no. 4194/2013, which prescribes for former judges to enroll as lawyers after “reasonable time” from their retirement has passed, with no further specialization.

²⁷ Art. 9, Bologna- Milano Global Code of Judicial Ethics, approved at the International Conference of Judicial independence held at the University of Bologna and at Bocconi University of Milano, June 2015.

²⁸ See also the recently abolished by the decree no. 2021-1574 of 24 November 2021, Art. 25 (V) (2), Law no. 83-634 of 13th July 1983.

²⁹ Code of Ethics for the administrative judges of France, Ed. 2021, at 23, available at: <https://www.conseil-etat.fr/qui-sommes-nous/deontologie>.

³⁰ Supra note 29.

³¹ See also, Conseil d' Etat, Opinion n° 2012/3 of June 4th 2012, at 84, available at: <https://www.conseil-etat.fr/Media/contenu-froid/documents/deontologie-des-membres/avis-et-recommandations/avis2012-3>.

³² Under III.15, German Code of Conduct for the Justices of the Federal Constitutional Court, available at: https://www.bundesverfassungsgericht.de/EN/Richter/Verhaltensleitlinie/Verhaltensleitlinien_node.html;jsessionid=03D7CB62485F2FB47A54FF248256A125.2_cid329.

³³ Regarding the aim of the disciplinary provisions for judges see: Supreme Court (Kansas, USA), *State ex rel. Comm'n on Judicial Qualifications v. Rome*, February 10th 1981, “[...] The aim of judicial discipline 'is the maintenance of the honor and dignity of the judiciary and the proper administration of justice rather than the punishment of the individual’”.

their previous active status they no longer possess.³⁴ The void of protection regarding the recipient of the alleged misconduct, arising from the judges' ability to shake responsibility by filing for retirement, has been heavily criticised, especially on the other side of the Atlantic.³⁵ For this reason, in some Codes, namely in Portugal and Belgium, special provisions have been set in place in order for ongoing procedures against former judges not to automatically cease after retirement³⁶ or for them to retain accountability for a period of time after retirement.³⁷

Going beyond the provisions laid by the European countries, similar obligations for former judges are set in Codes of Conduct for judges around the world.³⁸ Among them, one can find quite restrictive provisions such as the complete ban of former judges from practicing as lawyers found both in the Russian Code of Judicial Conduct³⁹ and, not so expected, in the 2016 version⁴⁰ of the England and Wales Code for the Judiciary.^{41,42} But also, on the opposite side of the spectrum, one can also find quite

³⁴ See, relevantly, Judicial Council of the second circuit of the Court of Appeals (USA), decision of April 2019, in which the judiciary administrative body noted: "When the subject of the complaint is no longer a judicial officer, he is beyond the reach of these procedures and the remedies they prescribe", available at: https://www.ca2.uscourts.gov/judges/judicial_council.html.

³⁵ Fix the Court, "*Retiring to Avoid Consequences: Judges Exploit a Loophole to Maintain Pensions in Spite of Misconduct*", October 1st 2021, available at: <https://fixthecourt.com/2021/10/retiring-to-avoid-consequences-judges-exploit-a-loophole-to-maintain-pensions-in-spite-of-misconduct/>.

³⁶ Art. 89, Law no 21/85 of the 30th of July, Statue of Judges and Magistrates of Portugal, available at: https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=5&tabela=leis&ficha=1&pagina=1.

³⁷ Art. 259bis20, Judicial Code of Belgium, 1970, available at: <http://www.ejustice.just.fgov.be/eli/loi/1967/10/10/1967101053/justel>.

³⁸ See for example: a. art. 13, Principles and Rules of Conduct of Judges in the Republic of Kazakhstan, adopted by VII Congress of Judges on November 21st 2016, available at: https://www.legislationline.org/download/id/8773/file/Kazakhstan_code_judicial_ethics_2016_en.pdf, b. art. 17 of the Code of Judicial Conduct for Judges in the Republic of South Africa, adopted by the Parliament in October 18th 2012, available at: <https://www.justice.gov.za/legislation/notices/2012/20121018-gg35802-nor865-judicial-conduct.pdf>, c. chapter 7, Guide to Judicial Conduct of Australia, adopted by the Australasian Institute of Judicial Administration Incorporated, in November 2017, available at: <https://aija.org.au/wp-content/uploads/2017/12/GJC-3ed-Nov2020.pdf>.

³⁹ Art. 16, Code of Judicial Ethics of Russia, adopted by the VIIIth Russian Conference of Judges on December 19, 2012, as amended by Ruling of the 9th All-Russia Congress of Judges on 8th of December 2016, available at: http://www.supcourt.ru/en/judicial_system/code_judicial_ethics/.

⁴⁰ Guide to Judicial Conduct for the Judiciary of England and Wales, published in March 2013 and revised in July 2016, available at: <https://www.judiciary.uk/wp-content/uploads/2010/02/guidance-judicial-conduct-v2016-update.pdf>.

⁴¹ *Supra*, note 40, Chapter 9 titled "After retirement", which states: "9.1 The conditions of appointment to judicial office provide that judges accept appointment on the understanding that following the termination of their appointment they will not return to private practice as a barrister or a solicitor and will not provide services, on whatever basis, as an advocate in any court or tribunal in England and Wales or elsewhere, including any international court or tribunal, in return for remuneration of any kind, or offer or provide legal advice to any person. The terms of appointment accept that a former judge may provide services as an independent arbitrator/ mediator and may receive remuneration for lectures, talks or articles".

⁴² Regarding what was expected of the English judges even before the adoption of the Code, see also: Questionnaire on the conduct, ethics and responsibility of judges, CCJE (2002) 34, 18.6.2002, at. 3 available at: [ccje/docs2002/CCJE\(2002\)34](http://www.ccej.org/docs2002/CCJE(2002)34).

liberal provisions such as the ones regarding the freedom of the former judge to accept governmental appointments upon retirement, with no further restrictions, found in the American Code of Judicial Conduct.⁴³

II. The effect judicial ethics have on the main aspects of the former judges' life.

A. Political Action and Assumption of Public Office.

In several countries it is observed that many judges, after leaving office, are actively involved in politics or take positions in the state apparatus associated with the exercise of public authority. This transition, however, especially when it takes place immediately after retirement, may call into question the independence of the judge in the performance of his or her duties and create suspicions of unfair entanglement between the executive and the judiciary. Therefore, increased care is required when a former judge seeks to assume a political or public office so as not to confuse his or her previous capacity with their new role. The issue is raised on a different basis and has different dimensions depending on whether there is interference of the electorate in the process or not.

With regard to elected office, it could be argued that a possible ban on former judges participating in the electoral process would constitute an excessive restriction on their civil liberties, since, despite their association with the judiciary in the conscience of the people, they no longer exercise actually judicial duties. In this regard, a US state court has ruled that the ban on expressing public support for a candidate for public office, which applies to incumbent judges, does not extend to retirees, although they may in the future take on judicial duties as special judges.⁴⁴ The court reached this decision by interpreting the relevant provision of the Code of Ethics in force based on the constitutionally guaranteed freedom of speech, considering that the threat to judicial

⁴³ Code of Conduct for United States Judges, adopted by the Judicial Conference, on March 2019, at 20, available at: https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf#page=18&zoom=100,92,610.

⁴⁴ Art. 110(5)(b) of the Kentucky Constitution empowers the Chief Justice of the Kentucky Supreme Court to "assign temporarily any Justice or Judge of the Commonwealth, active or retired, to sit in any court other than the Supreme Court, when he deems such assignment necessary for the prompt disposition of causes". Historically, a retired judge who is considered more experienced replaces a disqualified regular judge as a special judge.

⁴⁵ Supreme Court of Kentucky (USA), *McDonald v. Ethics Committee of the Kentucky Judiciary*, No. 99-SC-00531-OA, Judgement of 21 October 1999.

integrity is weakened when the judge in question is no longer exercising active judicial duties.

After all, in a regime based on popular sovereignty, the will of the electorate is the ultimate source of legitimacy, which would potentially make such a restriction incompatible to the democratic principle. In addition, retired judges may prove to be the best activists in the field of justice, human rights, promotion of judicial independence or reform of the penal system, thus making their participation in the democratic process legitimate in terms of expediency.⁴⁶

On the other hand, in certain circumstances the participation of a former judge in an electoral process may reasonably raise doubts as to how he or she performed their duties while in active service. For example, this is the case where a former judge runs in the next post-retirement parliamentary elections on the ruling party's ballot, which may be seen as a result of his pro-government stance in the exercise of his judicial duties. Another question that arises, assuming that it is in principle legitimate for a former judge to participate in an electoral process, is whether he or she can use their previous judicial capacity to support their candidacy.⁴⁷ It is therefore imperative to strike the right balance between the civil liberties of the retired judge and the protection of the prestige and independence of the judiciary.

A particular problem that arises has to do with the attitude of the former judge towards his judicial duties and the justice system in general, when he carries out political activity. Every public official has an obligation of fidelity and confidentiality for information that he acquires during the performance of his duties, while this obligation is maintained even after his departure from the service. This is all the more true in the case of judges due to the special nature of the judicial process and the need to preserve the prestige of the judiciary, as citizens' trust in the justice system is a necessary element for its functioning within a state governed by the rule of law. The public must overwhelmingly accept the courts as the proper forum to settle civil disputes that arise, as well as to diagnose one's guilt or innocence in relation to a criminal charge. For this reason, judges, even after retirement, must exercise restraint

⁴⁶M. Greenstein, Ethics for former judges (2020), https://www.americanbar.org/groups/judicial/publications/judges_journal/2020/fall/ethics-former-judges/.

⁴⁷Ibid.

when expressing themselves in any case where the validity or impartiality of justice can be challenged.⁴⁸

On the other hand, excessive restrictions on freedom of expression cannot be accepted in a democratic society, when the freedom is exercised in the context of an election campaign or during the development of any political activity. This would violate fundamental principles governing the structure and functioning of a political democracy. The European Court of Human Rights (ECtHR) attaches particular importance to the unimpeded exercise of the right to freedom of expression by candidates in the electoral process for state office.⁴⁹ What can and should be required of former judges involved in a political process is to put into public debate any information about the functioning of the justice system with decency, moderation and accuracy.

In the case of *Kudeshkina v. Russia*, a judge of the Russian Federation participated in the parliamentary elections, having suspended her status as a judge in accordance with national law. Following her non-election and return to the judiciary, the penalty of dismissal was imposed to her for statements she made to the media regarding corruption and problems in the functioning of the domestic justice system, as the competent disciplinary body considered that the statements do not comply with the office of the judge and degrade the prestige of justice. The ECtHR held that, even if the applicant's statements had a degree of exaggeration and generalization, characteristic of political discourse in the context of an election campaign, her allegations were not unsubstantiated and therefore they constitute a fair comment on a matter of great public importance.⁵⁰

In any case, the interference of an electoral process and the consequent ratification of the assumption of public office by the people alleviate any problems that may arise from the transition of a judge to the legislature or the executive. More problematic and of greater practical importance is the case of the appointment of former judges in administrative positions (such as independent authorities, committees, etc.) at the initiative of the government. The prospect of assuming such an office after retirement, when a judge suffers a - more or less - reduction in their income, creates

⁴⁸ECtHR, *Wille v. Liechtenstein*, Appl. no. 28396/95, Judgement of 28 October 1999, at para. 64.

⁴⁹ECtHR, *Malisiewicz-Gasior v. Poland*, Appl. no. 43797/98, Judgement of 6 April 2006, at para. 68-70, *Kudeshkina v. Russia*, Appl. no. 29492/05, Judgement of 26 February 2009, at para. 87.

⁵⁰*Ibid*, *Kudeshkina*, at para. 95.

conditions that reasonably raise doubts about the exercise of their judicial work in an impartial and independent manner in relation to the government, for at least a few years prior to their retirement. The judge could possibly act in a discriminatory manner, wanting to secure the favor of the government, on which his or her future professional perspective depends. Even if this is not the case, the placement of judges in such offices immediately after leaving the active service can raise citizens' suspicions of entanglement with the executive, shaking the prestige and public confidence in the judiciary.

In some countries this phenomenon is particularly intense and its causes can be traced to structural deficits. In India, for example, 56% of administrative offices assumed by retired judges must be filled by persons in that capacity under existing law.⁵¹ A study conducted in this country found that there is indeed a significant positive correlation between the government's appointment of retired judges and their decision-making in favor of the state in important cases. This means that incumbent judges maximize their chances of being placed in an administrative position after leaving office, when they tend to favor the government.⁵² Of course this study shows a statistical correlation in the case of India, but who can be sure that the results would not be similar if the research was conducted in European countries with related practices?

In Greece there are virtually no legal restrictions on the activity of judges after their retirement. For example, the current President of the Republic, Mrs. Aikaterini Sakellaropoulou, was nominated by the governing majority for the highest state office in the country while still serving as President of the Hellenic Council of State. Another typical case is that of Mr. Charalambos Athanassiou, former President of the Association of Greek Judges and Prosecutors, who after leaving the Supreme Court of Cassation was elected Member of the Parliament with one of the largest historical parties in the country and assumed the office of Deputy Minister of Interior and later the office of Minister of Justice. Because of the personality and the integrity of the persons involved, these cases have not led to questioning of the validity and impartiality of the judiciary. However, as elaborated below, there have been incidents that reasonably have shaken the trust of the citizens in the institution.

⁵¹U. Poddar, Can governments dangling postretirement jobs for judges influence the courts? (2021), available at <https://scroll.in/article/1013516/can-governments-dangling-post-retirement-jobs-for-judges-influence-the-courts>.

⁵²M. S. Aney, S. Dam and G. Ko, 'Jobs for Justice(s): Corruption in the Supreme Court of India' (2017), available at <https://pdfs.semanticscholar.org/e8cb/1646e33c955d8c42702d351ed1c5ad92d46d.pdf>.

A controversial case is the one concerning Mrs. Vasiliki Thanou, who was chosen by the government in 2015 to lead the Supreme Court of Cassation. For a short period of time until the elections of the 20th of September 2015, she was the caretaker Prime Minister in the above capacity. In 2017, she unsuccessfully sought to raise the retirement age of senior judges so that she would not be forced to step down. After her retirement⁵³, she was appointed Head of the Legal Office at the General Secretariat of the Prime Minister, while at the end she took over the office of Chairman of the Hellenic Competition Commission. The new government that emerged after the elections took a legislative initiative to establish an incompatibility between the capacity of member of this independent authority and holding an office, inter alia, in the General Secretariat of the Prime Minister within the last five years. Based on this provision, Mrs. Thanou was removed from the office of Chairman of the Hellenic Competition Commission, which was deemed legal by the Hellenic Council of State.⁵⁴ Furthermore, in 2016, when Mrs. Thanou was still the President of the Supreme Court of Cassation, the well-known Greek businessman Andreas Vgenopoulos had filed a complaint against her, claiming that she had tried through a friendly person to extract money from him in order to handle his pending court cases. The case file was recently removed from the archive, as an audio document was published in the media, in which the late Andreas Vgenopoulos talks to a friend of the former President of the Supreme Court of Cassation regarding the settlement of his court cases.⁵⁵

Regardless of one's point of view on specific persons and situations, it is clear that such phenomena in public life undermine public confidence in the independent and impartial exercise of the duties of judges, as well as in the justice system in general. If one considers that all the constitutionally provided independent authorities of the country, with the sole exception of the Ombudsman, include among their members one or more former judges, one realizes that the problem is structural and is not related to specific individual behaviors. It should be noted here that the issue of staffing independent authorities and committees by retired judges in a very short time after their retirement has been highlighted by the Association of Greek Judges and Prosecutors,

⁵³ Also in 2017.

⁵⁴ Hellenic Council of State, judgement no. 911/2021, *V. Thanou etc. v. Minister of Development and Investment*.

⁵⁵ I. Mandrou, The case file of Vgenopoulos – Thanou came out of the archive, <https://www.kathimerini.gr/society/561842212/anasyrthike-i-dikografia-gia-tin-ypothesi-vgenopoyloy-thanoy-2/>.

which has even proposed a ban on holding offices in the Greek administration for a period of two years after leaving the judicial service.⁵⁶

B. Professional life of a former judge- the case of former judges turning lawyers.

The return of a former judge to private practice is a challenging issue for both the legal and judicial world worldwide. The challenge stems from the fact that, theoretically, a former judge maintains "connections" to the judiciary, which can allow them a competitive lead to the detriment of their new lawyer colleagues. The main purpose of the regulating provisions regarding the practice of law by former judges is to ensure the impartiality and independence of the judiciary, while secondarily it also aims to safeguard the interests of lawyers.

To begin with, as already mentioned, Charters or Codes of Ethics contain recommendations regarding the conduct of the judge, without introducing rules of law, the violation of which could lead to specific (legal) consequences. Mainly for this reason there is a lack of jurisprudence, related to issues of compliance with ethical practices by former judges, both in general and regarding their professional life in specific. This is highlighted, in particular, by the Irish courts that noted the difference between a practice or tradition and a rule of law contained in legislation.⁵⁷ Particularly, in the case of *White v The Bar Council of Ireland*, the issue of the economic situation of a retired judge arose. The applicant claimed that the reason he wishes to be admitted in the defense counsel list and work as a barrister after his retirement from the judiciary was the inadequacy of the pension he was receiving, which was putting at risk his own and his family's livelihood. The Court held that the applicant had not proven the claim of economic necessity, but that the Minister breached his constitutional rights to work and earn a livelihood, as he imposed a restriction on Mr White in the practice of his profession that goes beyond what is contemplated by the applicable law.⁵⁸

⁵⁶ Ch. Sevastidis, President of the Association of Judges and Prosecutors, Forum 'Greece in 2040', available at <https://ende.gr/category/arhra/page/2/>.

⁵⁷ High Court of Justice (Ireland), *White v The Bar Council Of Ireland & Ors*, n. 2015 582 JR, para. 21, 22 July 2016.

⁵⁸ Mary Carolan, "Retired Judge Wins Case To Practise As Barrister", 22 July 2016, available at <https://www.irishtimes.com/news/crime-and-law/courts/high-court/retired-judge-wins-case-to-practise-as-barrister-1.2731062>.

In addition, in a case handled by the Federal Administrative Court of Germany,⁵⁹ concerning the framework for a retired judge to practice as a lawyer, an article of the German Civil Service Code⁶⁰ was interpreted, according to which the public officials, including judges, should avoid any occupation related to their previous activity after they retire or cease to hold office, for a period determined by the law of each German state. This period cannot exceed the five years mark. The Court, after subjecting the case of a retired judge who intended to advocate in the district of the court where he previously exercised his jurisdiction to the above provision, ruled that the obligation to wait for three years before the beginning the practice of law in the district is not against the law. This means, however, that in another district the former judge can practice law immediately.

Furthermore, the French Council of State,⁶¹ in a recent decision, initially ruled that the rules introduced by the Charter of Judicial Ethics are morally valid and, in principle, do not lead to disciplinary action.⁶² Specifically with regard to an article of the above Charter, related to the good practices recommended in case a former judge of the administrative jurisdiction returns to private practice,⁶³ a “cooling off” period of five years is provided, during which the judge cannot practice law before the court, in which he served. This period extends to ten years, if the former judge turned lawyer was a Presiding Member of the Court. The Council of State considered that the purpose of the provision is to ensure the judicial validity and the principles of independence and impartiality of the court. Given this, the court concluded that the liberty of appearing before any court of the state is not violated since there are no territorial restrictions and the provision only suggests good practices and does not aim at regulating the legal profession.⁶⁴ Finally, the Court held that the estimated duration of the “cooling off” period does not appear to be excessively disproportionate to the above objective.⁶⁵ However, this provision has been criticized by the French press.⁶⁶

⁵⁹ The Federal Administrative Court (Germany), 2 C 45/16 BVerwG, 4 May 2017.

⁶⁰ Art. 41, “Activity after leaving the service”, St. German Civil Service Code.

⁶¹ Council of State (France), N° 411070, ECLI:FR:CECHR:2020:411070.20200325, 25 March 2020.

⁶² Council of State, *Ibid.* at para 5.

⁶³ Charter of Ethics, para. 16.

⁶⁴ Council of State, *Ibid.* at para 14.

⁶⁵ Council of State, *Ibid.* at para 16.

⁶⁶ Maître Michel BENICHO, «Former Judges, New Lawyers », 1 December 2017, available at https://blogavocat.fr/space/michel.benichou/content/anciens-juges-nouveaux-avocats_?msclkid=1d6a8c6ccf9a11ec9c773e0f8820d51d.

On the contrary, in Greece, there is no specific provision tackling the abovementioned matter in the Judicial Code of Conduct of the Hellenic Council of State or the Court of Auditors, but there is a relevant regulation located in the Bar Code⁶⁷, which stipulates that:

A lawyer who has resigned from the legal profession may be reappointed, if five (5) years have not elapsed since his resignation or even after the lapse of five years, provided that he has exercised duties related to legal science and practice [...] Retired judges and prosecutors, except those who are dismissed due to disciplinary misconduct or due to mental incapacity, may be appointed lawyers, within a reasonable time after their departure from the service, provided that there is no impediment of those provided for in Article 6 [...] These judges and prosecutors are appointed as lawyers in courts of first instance, the appellate courts or at the Supreme Court of Cassation, on the basis of the amount of years they have served, at any rank, and according to the qualifications required for the promotion of lawyers.

In other words, Greek law, contrary to German or French law, provides for the maximum time limit, within which the former judge can return to being a lawyer after leaving the judiciary. According to this provision a maximum time limit is essential in order for the new lawyers to be harmonically incorporated into the profession. The ratio of this provision and the lack of other prohibitions regarding the return of the former judges to private practice has been criticized by practicing lawyers.⁶⁸

Undoubtedly there are many issues that could arise from the practice of law by a former judge. First of all, the issue of impartiality. There are two aspects to this issue since one may argue that impartiality is impaired at all instances regardless of the court that the former judicial officer appears before or it is only impaired when they appear before the court, they once served in. One could reasonably assume that a judge can use the knowledge gained through the judicial function to serve the interests of his or her principal. However, this does not harm the impartiality of the court before which they appear, but possibly the court in which they served. What is impaired is not only the

⁶⁷ Art. 27 (1), St. 4194/2013, Bar Code.

⁶⁸ El. Julia, «*Advocacy By A Former Judge: Current Regulations*» 5 May 2017, available at <http://www.justina.gr/%CE%BD%CE%BF%CE%BC%CE%BF%CE%BB%CE%BF%CE%B3%CE%AF%CE%B1/%CE%B3%CE%B5%CF%81%CE%BC%CE%B1%CE%BD%CE%AF%CE%B1/askisi-dikigorias-apo-tews-dikastiko-leitourgo-ti-isxyei/>.

perception of the former judge but also the status of the court they were once a member of. It would be helpful for both the former judges and the public view to have jurisprudence regarding the reasonable time that should pass before the former member of the bench returns to practice, in order to preserve the legitimacy of the judiciary. Let us not forget, that the specialization of the length of “cooling off” period is essential. As mentioned in a previous chapter, this time varies greatly from one framework to another and can easily lead to complete exclusion from the profession, since in most cases the person retiring is around the age of 65 to 67 and their prime working years have already gone past them.⁶⁹

C. Personal life of the former judge.

As already established, the ethical restrictions regarding the judiciary apply in both their judicial duties and their personal life.⁷⁰⁷¹ As seen in relevant case law judges in France were faced with disciplinary sanctions imposed by the Supreme Council for the Judiciary, that noted that regular gambling is linked with creating sizeable debts, which indicates personal characteristics that do not conform with the integrity expected from a judge.⁷²⁷³ According to the same case law, the same sanctions are imposed even if they member of the judiciary created their debts prior to the judicial appointment. Can the same apply for retired judges? One could argue that since the time of the creation of the debt is irrelevant and given that for the public a judge is always a judge, even after retirement the former member of the bench should abstain from gambling. To add to this argument, in many countries, amongst them Greece⁷⁴, former judges receive state pensions, that is regarded an extension and a continuum of the salary they

⁶⁹ Jim O’ Kallaghan, “*Judges should not return to work as barristers*”, 27 July 2016, available at Judges should not return to work as barristers – The Irish Times.

⁷⁰ ECtHR *Özpinar v. Turkey*, application no. 20999/04, judgement of 19.10.2010, para. 71.

⁷¹ F.Sotiriadou, judge at Greek administrative courts of first instance, “Thoughts on the Code of Judicial Conduct”, 25.10.2021, available at: www.ende.gr.

⁷² Supreme Council for the Judiciary (France), decision no. S223/21.01.2015, available at: <http://www.conseil-superieur-magistrature.fr/missions/discipline/s223>.

⁷³ Supreme Council for the Judiciary (France), opinion no. P078/24.06.2014, available at: <http://www.conseil-superieur-magistrature.fr/missions/discipline/p078?search=P078>.

⁷⁴ See Greek Constitution, revised in November 25th, 2019 by the Ninth Revisionary Hellenic Parliament, published in the Official Government Gazette. 187/A/28.11.2019, art. 26, 87 (1) and 88 (2), available at: <https://www.hellenicparliament.gr/Vouli-ton-Ellinon/To-Politevma/Syntagma/>.

received as active serving members of the judiciary.⁷⁵⁷⁶ Given this, expanding on the same argument, former judges should continue to treat their earnings as they did when active, since even after retirement they are compensated for their public service. Yet, the question remains: are those arguments enough to ban their very entrance into casinos? That is up for debate.

Apart from the ethical dilemmas concerning financial entanglements, there are other ones, closer to the sphere of individuality, to be considered. In a recent case before the Kansas Commission on Judicial Conduct, it was proposed for a Kansas judge to be sanctioned by public censure for posting nude pictures of himself on a website, while still on the bench.⁷⁷ The Kansas Supreme Court, on the other hand, when tackling the same case decided that it would take no further action against the former judge, since even though the court accepted the disciplinary panels' ruling that the former judge violated rules of judicial conduct by sharing the photos, it held that no further action is required because the member resigned from the bench prior to the hearing.⁷⁸⁷⁹ Given that part of the leniency of the Court stemmed from the fact that the judge was no longer on the bench, one can draw the conclusion that once the robe is off, ones clothes can follow, with no repercussions. Yet, despite the disciplinary sanctions or the lack thereof, is that enough to "free" former judges from the public scrutiny that would, most likely, ensue from such behaviour? Or is that same scrutiny reason enough to impose ethical rules against it? The answer, as most ethical matters, is up for debate and interpretation.

⁷⁵ Hellenic Council of State, judgement no. 3540-1/2003 (in plenary session).

⁷⁶ Hellenic Court of Auditors, judgement no 244/2017 (in plenary session).

⁷⁷ Commission on Judicial Conduct (Kansas, USA), Findings of fact, Conclusions of law and Recommended Disposition, no.2265/4.5.2021, available at: [https://www.kscourts.org/KSCourts/media/KsCourts/Judges%20-%20Secondary%20Nav%20Page%20PDFs/PublishedJudicialDisciplineCases/In-re-Clark-\(2265\)-Recommendation-to-Supreme-Court.pdf](https://www.kscourts.org/KSCourts/media/KsCourts/Judges%20-%20Secondary%20Nav%20Page%20PDFs/PublishedJudicialDisciplineCases/In-re-Clark-(2265)-Recommendation-to-Supreme-Court.pdf).

⁷⁸ Supreme Court of Kansas (USA), judgement no 123,911, 28th of January 2022, available at: <https://www.kscourts.org/KSCourts/media/KsCourts/Opinions/123911.pdf?ext=.pdf>.

⁷⁹ In the same judgement, supra note 78, during the discussion held by the Supreme Court, Justice Caleb Stegall did not dispute the commission's finding but argued that, in his opinion, while the behaviour was "embarrassing, foolish, and grossly immoral, it was not a violation of any of [the] rules governing judicial conduct".

III. Conclusions

Thales of Miletus⁸⁰ famously said that one should avoid doing what they would blame others for doing. The quote, still relevant to this day, suggests vague and subjective ethical boundaries, that may be applicable to the general public but are not merely enough, when judges are concerned. In an effort to determine the appropriate moral restrictions regarding the former judges specifically, we outlined, in this paper, the framework, the repercussions and the concerns arising from the relevant provisions in place. Given this, our effort would not be complete without a proposition regarding the abovementioned concerns. As elaborated above, the purpose of establishing ethical provisions regarding the judiciary is to ensure, above all else, their impartiality and independence. Oriented, therefore, to this goal, we have reached a number of practical propositions, as set below.

To begin with, regarding the issues that arise in relation to the independence and impartiality of the judge, when he is totally free to hold other public offices after his retirement, a possible total ban on political activity and appointment to administrative positions would be problematic, in view of the individual rights and civil liberties of the retired judge. In particular, with regard to the assumption of elected office, the imposition of any restrictions would appear unnecessary since the interference of the electorate is the supreme form of legitimacy in a democratic state. However, it would be expedient to introduce a “cooling off” period after leaving the service during which the appointment to independent authorities and other unelected positions in the public administration will not be allowed. We suggest that this period should last approximately four years, equivalent in several countries to the electoral cycle, so that there are no conditions conducive to entanglement between the government and judges who are about to retire in the near future.

Furthermore, regarding the return of a former judge to being a lawyer, we believe that no absolute provision can amount to the desired result. For this reason, we find ourselves against the solution of an absolute ban or provisions that practically equal to an absolute ban, like a ten year “cooling off” period. This does not mean we are against the “cooling off” period provisions as a whole, since they arguably ensure the

⁸⁰ Ancient Greek philosopher, 643-548 BC.

impartiality both of the court before which the former judge will appear as a lawyer and of the former member of the bench. We believe, however, that this period should not exceed the two-year mark. Given that a former judge may be a retired judge,⁸¹ it is almost unreasonable and unrealistic to prescribe for a longer “cooling off period”, since the former judge turned lawyer will no longer be of productive age.⁸² In addition, abstaining for more than two years may lead to alienation from the legal knowledge and expertise and, thus, to a distancing from legal science.

Moreover, regarding the ethical restrictions a former judge should abide by in his personal life, we conclude that they should be non-existent. Reiterating the purpose of the codes of judicial conduct, they are set in place in order to guard against the very real danger of judges as ordinary human beings tempted to abuse their power in vain and self-interested ways.⁸³ Taking this into consideration along with the fact that the abovementioned danger diminishes greatly when the judge retires, we conclude that the Codes should not be concerned with preserving judicial authority grounded in the appearances of its former members and to this end their personal matters should be completely excluded from their provisions. Regulating such matters, ultimately, can lead to an abuse of the power the judiciary holds on its own members which should be viewed as, potentially, the actual threat to the integrity of the judiciary. After all, the rule of law is not so weak it would collapse in the face of, not direct ethical provision violations, but simply embarrassing missteps of a former judge, who is still, after all, human.

To sum it all up, since, as the title suggests, there is a shadow following each judge and we sincerely doubt that any of them is Lucky Luke in order to outran it, the solution we thought wise was to shed light on it.

⁸¹ For example, according to art. 88 (5) of the Greek Constitution the retirement age for judges is 65 and for members presiding over the Court of Cassation and the Supreme Court judges it goes up to 67.

⁸² As mentioned in the judgement *White v The Bar Council Of Ireland & Ors*, see supra note 57, regarding the notion the former judge could retrain himself in his 70s for a new line of work was “a theoretical possibility but a practical nonsense”.

⁸³ Supra note 78.