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DOES THE APPLICATION OF UNJUST LAWS UNDERMINE JUDICIAL INTEGRITY?

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1. Introduction

> "*The hottest places in hell are reserved for those who, in a period of moral crisis, do nothing*."
>
> Dante Alighieri

In their daily work, judges are confronted with numerous ethical dilemmas which they endeavour to resolve by searching for answers in national codes of ethics or the rules incorporated in the Bangalore Principles of Judicial Conduct[1]. It would be safe to say that ethical standards, integrated in codes of ethics, give judges merely the guidelines to follow in given situations, thus representing a frame with a picture yet to be inserted. Codes of ethics predominantly (or, rather entirely) deal with aspects of judicial actions which are most obvious to a reasonable observer[2] - independence, impartiality, propriety, dignity, etc. However, dilemmas that judges are confronted with in their professional work and adjudication on daily basis, are sometimes so delicate and profound that codes of ethics and ethical standards do not provide direct answers for their resolution.

One of such dilemmas is how to proceed once a judge is confronted with a law or a legal rule the application of which in a specific case would obviously result in unjust outcome. The resolution of such a dilemma is far from simple, because it simultaneously raises an issue of what impact this may have not only on the integrity of the judge, but of the entire judiciary. This is due to the fact that integrity itself represents an essential category of the judicial ethics and implies multiple personal qualities expected of judicial office holders. A judge must adjudicate in a way which also demonstrates personal qualities of *"wisdom, loyalty, humanity, courage, seriousness and prudence, while having the capacity to listen, communicate and work (...), which are essential requirements to guarantee the right of everyone to have a judge*"[3]. Integrity of a judge is *sine qua non* judicial value which

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[1] The Bangalore Principles of Judicial Conduct, 2002 *(The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002)*, available at https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

[2] Alex Kozinski - *The Real Issues of Judicial Ethics*, Hofstra Law Review, 2004, p.1095

[3] European Network of Councils for the Judiciary (ENCJ) - *Judicial Ethics Report* 2009-2010, p. 11, available at https://www.encj.eu/images/stories/pdf/ethics/judicialethicsdeontologiefinal.pdf

safeguards public confidence in the judiciary and exercise of democratic principles in the rule of law. [4]

The most comprehensive and one might say the most important and most relied upon document incorporating judicial ethical standards that judges look upon when searching for way-outs is the Bangalore Principles of Judicial Conduct which, in the part dealing with integrity, in Article 3.2 stipulates that "*Justice must not merely be done but must also be seen to be don*e". Such a provision may additionally reinforce the said dilemma since, if integrity also implies that justice must be seen to be done, does it follow that an application of unjust law or legal rule is in compliance with integrity of a judge who enforces it? Nonetheless, the Commentary on the Bangalore Principles, in the section referring to integrity, underlines an obligation of the judge to apply the law, although it is mentioned that this rule is not an absolute one.

After the end of World War II, Europe has witnessed reconsideration of judge's obligations expressed in the Latin legal maxim *Dura lex, sed lex*, due to the fact that judges at the time justified their actions of applying Nazi laws by arguing that they were only applying the laws as they were enacted. The renowned German legal philosopher Gustav Radbruch thought that strict application of the law had contributed to the crimes committed, and that basic moral principles ought to be enshrined in the notion of legality.[5] The thinking that morals are enshrined in the very notion of legality did not remain in theoretical sphere only, since in the after-war Germany judges did deliver sentences against the Nazi regime informers, whose actions were not illegal according to the laws of that time, with judges referring to the fact that such laws were null and void because they violated the fundamental moral principles.[6]

Although from today's lenses the mentioned cases represent a rare and extreme example, we are of the opinion that this ethical dilemma is still current today, whenever judges are confronted with an unjust legal provision which is in conflict with fundamental requirements of justice.

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[4] *Judicial ethics handbook*, Bosnia and Herzegovina, February 2019, p.81-82
[5] Herbert Lionel Adolphus Hart - *Essays in Jurisprudence and Philosophy*, Official Gazette, Belgrade, 2015, p.82
[6] Judgment of 27 July 1949, Oberlandesgericht, Bamberg, 5 Suddeutche Juristen-Zeitung, 207 (1950), 64 Harvard Law Review, 1005 (1951)

Acceptable answers to similar questions have been sought in legal discussions throughout the United States for decades now.[7] In this regard, a distinguished American law professor Grant Gilmore singled out several possibilities that a judge may have available in situations of this kind: to resign from the judicial office, to refuse to apply the law as immoral, to try and resolve the dilemma through legal gaps or to apply the law "*with death in his heart - because it is the law, duly established by the constituted authorities, and because, as a judge, he has no other choice*."[8]

The authors of this paper will try to revive this old (albeit, in our region, blocked out) dilemma, and to illustrate the complexity of this issue to which there are no easy answers, in spite of what it may look like on the face of it. In this paper, we will endeavour to shed some light on possible approaches to resolving this ethical dilemma by a judge, the impact the offered approaches might have on judge's integrity and, consequently, the entire judiciary.

2. Facts of a hypothetical case

For the purpose of better understanding of the stipulated approaches, we will rely upon the facts of a hypothetical case, in which strict application of legal rules, at least in the opinion of the authors of this paper, results in manifestly unjust outcome:

The defendant M.S. was pronounced guilty by the first-instance court of charges of unlawful production and distribution of narcotics pursuant to Art. 246, paragraph 1 of the Criminal Code, and was sentenced to imprisonment of the mandatory minimum sentence of three years, because it was established that he had manufactured cannabis oil, which was classified as a narcotic drug. The defendant confessed to the crime, but defended himself by saying that he had manufactured the oil himself, and used it solely for his own needs; since he was suffering from pancreatic cancer, he used the oil to alleviate excruciating pains. The examination of the medical files confirmed that the defendant was really suffering from pancreatic cancer, that he was in final stages of terminal illness, and that his pains were

[7] The Hart-Fuller exchange on law and morality - Hart, Positivism and the Separation of Law and Morals, 71 H~Av. L. Rzv. 593, at 614-629 (1958); Fuller, Positivism and Fidelity to Law - A Reply to Professor Hart, 71 HAiv. L. REv. 630, 659 (1958)

[8] Grant Gilmore - *The ages of American Law*, (Storrs Lecutres on Jurisprudence) New Haven: Yale University Press, 1977, p. 37-38

considerably alleviated, whenever he used the cannabis oil. The first-instance court assessed as extenuating circumstances that defendant manufactured the narcotic for his own use i.e. to alleviate his own pain, but did deliver the mandatory minimum prison sentence of three years, having in mind that the Criminal Code did not permit leniency below the mandatory minimum sentence for this criminal offence.

The defendant's lawyer appealed the sentence, and the Appellate Court scheduled a session of the court panel to decide on the appeal. The Appellate Court panel consisting of three judges initiated a legal debate on the case, which soon turned into an ethical discussion – whether the prison sentence delivered in this specific situation was a just solution, what were the possibilities available to judges in the labyrinth of justice that would uphold the judicial integrity at the same time?

3. Strict application of the law

When a judge is confronted with an ethical dilemma of whether or not to apply unjust legal provisions or the legal provision, which in this specific case produced an unjust result, apparently the sole option available to the judge is a strict application of the law. The obligation to apply the law is derived, primarily, from the Constitution of the Republic of Serbia, which prescribes that court decisions shall be rendered in the name of people; they are based on the Constitution, Law, ratified international treaties and regulations passed on the grounds of the Law. [9]

The obligation of a judge to apply the law is also reiterated in the Commentary on the Bangalore Principles of Judicial Conduct, where it is explained that: *"When a judge transgresses the law, the judge may bring the judicial office into disrepute, encourage disrespect for the law, and impair public confidence in the integrity of the judiciary itself. This rule cannot be stated in absolute terms either. A judge in Nazi Germany might not offend the principles of the judiciary by mollifying the application of the Nuremberg Law on racial discrimination. Likewise, the judge in apartheid South Africa. Sometimes a judge may, depending on the nature of the judge's office, be confronted by the duty to enforce laws that are contrary to basic human rights and human dignity. If so confronted, the judge may be duty bound to resign the judicial office rather than compromise the judicial duty to enforce*

[9] *Constitution of the Republic of Serbia* ("Official Gazette of the RS", No. 98/2006), Art. 145

the law. A judge is obligated to uphold the law. He or she should not therefore be placed in a position of conflict in observance of the law. What in others may be seen as a relatively minor transgression may well attract publicity, bringing the judge into disrepute, and raising questions regarding the integrity of the judge and of the judiciary."[10] Therefore, the Commentary sets the judge's duty to uphold the law as a solution to an ethical dilemma; on the other hand, it notes that that this duty is not to be understood in absolute terms, thus leaving a wide margin for its interpretation when resolving the ethical dilemma.

Strict application of a legal provision, whether unjust or not, implies a risk that the judge may become unaware of societal issues. In the Commentary on the Bangalore Principles, it is emphasised that *"the nature of modern law requires that a judge "live, breathe, think and partake of opinions in that world". (...) Increasingly, the judge is called upon to address broad issues of social values and human rights, to decide controversial moral issues, and to do so in increasingly pluralistic societies. (...) Legal standards frequently call for the application of the reasonable person test. Judicial fact- finding, an important part of a judge's work, calls for the evaluation of evidence in the light of commonsense and experience. Therefore, a judge should, to the extent consistent with the judge's special role, remain closely in touch with the community*."[11]

Relying on the principle of the division of powers, the former US Justice Antonin Scalia was also in favour of a strict application of the law. In his opinion, a judge has no possibility to change or "nullify the impact" of unjust law, and has a legal duty to apply the law as is, because in democratic states the legislative power lie with the people, who exercise that power through its elected representatives. Scalia would emphasise that judges cannot take over the role of a legislator and nullify the laws. The only thing judges can do, through the reasoning of their decisions, is to bring the attention of the public to the injustices in a specific law, all with the aim that such law be amended in a regular procedure.[12]

If we now go back to our hypothetical case, the strict application of the law in this situation would mean that the second instance court must uphold the sentence pronouncing

[10] *Commentary on Bangalore Principles of Judicial Conduct*, United Nations Office on Drugs and Crime, 2007, para. 108
[11] Ibid., para. 32
[12] Justice Antonin Scalia - *Of Democracy, Morality and the Majority*, Address and Responce to Questions at the Gregorian University in Rome (May 2, 1996), *in* 26 ORIGINS 82, 89 (1996)

M.S. guilty, and sentencing him to three years of imprisonment. Namely, according to the Criminal Code of the RoS, it is irrelevant for the substance of the criminal offence of producing narcotics, the offence for which M.S. was pronounced guilty by the decision of the first-instance court, whether the defendant produced the narcotics for sale and gaining profit or for his own use, such as medical treatment.[13] In addition, in a separate provision of the Criminal Code of the RoS, it is prohibited to mitigate the sentence of offenders of this criminal offence, and therefore the lowest statutory penalty that can be pronounced for the perpetrators of this criminal offence is three years of imprisonment.[14]

However, a question arises whether a strict application of these legal provisions imposed on the defendant who is terminally ill, who is dying and who prepared cannabis oil solely for the sake of alleviating his own pain, will bring justice not only to the defendant, but also, will the general public view it as justice served? On the one hand, by applying the law conscientiously and objectively, judges ensure equality of all persons before the law, and in that sense, the judge's action is in line with the principles of judicial ethics. On the other hand, the heart of the matter in preserving integrity of the judiciary is the conviction of general public that justice has been served in each specific case.[15] In our case, it would be hard to argue that sentencing a dying man to three years of imprisonment means that the justice has been served.

Thus, on the one hand, judges are duty bound to apply the law the way it has been enacted, and on the other hand, international and domestic ethical principles impose that such application of the law must be just and must be seen as just in the eyes of a reasonable observer.[16] Therefore, on the issue of integrity, it begs a question of how one can justify the sentence delivered on the basis of obviously unjust law or a legal rule the outcome of which is strikingly unjust, and whether such a sentence undermines or maintains judicial integrity.

[13] *Criminal Code of the Republic of Serbia* ("Official Gazette of RS", No. 85/2005, 88/2005 - corrigendum, 107/2005 - corrigendum, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019), Art. 246 Para. 1
[14] Ibid., Art. 57 para. 2
[15] *Bangalore Principles of Judicial Conduct*, op.cit., Value 3, Para. 3.2
[16] Ibid.

4. Direct application of international standards on human rights

When discussing the issue of applying an unjust law, we should reflect upon a possibility of direct application of international standards on human rights. The Constitution of the Republic of Serbia prescribes that ratified international treaties and generally accepted rules of the international law shall be part of its own legal system, and that laws and other general acts enacted in the Republic of Serbia may not be in contravention of the former ones.[17] The rule of direct application of human rights enshrined in generally accepted rules of international law and ratified international treaties shall apply, and provisions on human rights shall be interpreted in accordance with international standards on human and minority rights, and the practice of international institutions which supervise their implementation.[18] It is also envisaged that courts shall perform their duties not only in accordance with domestic legal rules, but also in accordance with generally accepted rules of international law and ratified international contracts.[19]

Consequently, one may conclude that judges in the Republic of Serbia, same as in other states of Europe, are obligated to apply the European Convention and legal rules developed by the European Court of Human Rights in its case-law. No matter how extensive the case-law of the European Court of Human Rights may be, it cannot be applied to each situation where application of a certain norm may result in an unjust outcome. If we go back to our hypothetical case now, we will see that there is no legal opinion of the European Court of Human Rights which would indicate that imprisonment of a terminally ill person who manufactures cannabis oil in order to alleviate his own pain represents a violation of his/her own rights. Therefore, in this case, the judge's ethical dilemma still remains regarding an unjust solution that the application of domestic criminal justice norms entails.

5. Evolutive interpretation of human rights

The European Convention itself incorporates about a dozen articles which deal with human rights, which is why it is proclaimed in the Court's practice that the Convention is a

[17] *Constitution of the Republic of Serbia*, op.cit. Art. 194
[18] Ibid., Art. 18
[19] Ibid., Art. 142

living instrument[20], and that its provisions on human rights are interpreted, amended and changed through the Court's practice. What happens once a judge is confronted with a dilemma whether or not to apply the obviously unjust domestic law, in case the Convention neither offers a legal rule that might be applied directly, nor has such a legal rule ever been set in the case-law through individual decisions delivered by the Court? Is there a possibility for a judge to apply evolutive interpretation of human rights referring to the provisions of the Convention, giving them a new content and meaning?

Far back in the 1970's, Ronald Dworkin asked the following questions: *Do judges always follow the rules, even in hard and controversial cases, or do they sometimes create new rules and apply them retroactively? For decades now, legal professionals have discussed the notion of what does respect for the rules actually mean. In these dramatic cases, the court stipulates the reasons, and not provisions, and refers to the principles of justice (...) Does it mean that the court still follows the rules, albeit of more general and abstract quality?*[21]

This method of resolving the dilemma of whether or not to apply unjust rules may be met with suspicion by legal positivists or its very notion even be discarded as an option, at the outset. The Commentary on the Bangalore Principles, in already mentioned section on integrity, stipulates that judges are expected to apply laws consistently, and that whenever faced with a conflict of such rules and own notions of justice, a judge should resign. However, in the case-law of the European Court of Human Rights the so called *evolutive interpretation* of the provisions of the Convention[22] is not unknown, even when it is completely in contravention with the domestic legal rule.

In the case of *Thlimmenos v. Greece*[23] the Court found violation of Article 14 which stipulates the prohibition of discrimination, taken in conjunction with Article 9 of the Convention which guarantees freedom of religion. Thlimmenos, a Greek citizen, was a Jehovah's Witness and a pacifist who, because of his religious belief disobeyed an order to wear the military uniform (as a conscientious objector) during the full-scale draft in Greece, and was therefore sentenced to four years of imprisonment. The Greek law did not recognise

[20] *Tyrer v. the United Kingdom*, App.no. 5856/72, 25 April 1978
[21] Ronald Dworkin - *Taking rights seriously*, Duckworth, Eighth impression 1996 (first published 1977), p. 23
[22] Kanstantsin Dzehtsiarou - *European Consensus and the ECHR's Evolutive Interpretation*, German Law Journal, Volume 12, Issue 10: Special Issue Legitimacy and the Future of the European Court of Human Rights, 01 October 2011, pp. 1730-1745
[23] *Thlimmenos v. Greece*, App.no. 34369/97, 6 April 2000

a possibility of conscientious objection, nor a similar judicial practice. Some time thereafter, having served approximately two years in prison, Mr. Thlimmenos passed an exam for a chartered accountant, and ranked the second out of sixty individuals who took the test. However, he was refused appointment by the authorities to a post of chartered accountant on account of his serious criminal conviction. Before the European Court of Human Rights, the applicant stated that the domestic laws made no difference between him as a pacifist and other perpetrators of similar criminal offences. In addition, he stated that such a criminal offence could not have posed an obstacle for carrying out the duties of an accountant, especially in view of the motives for the perpetrated offence. The State underlined that the authorities had no other option but to apply the enacted law, which was neutral in its stipulations, and neither made any distinction or imposed an obligation on the courts to investigate the circumstance of the specific case, but to implement the law to all and without any exceptions. The European Court found that it was the State which violated articles of the Convention to which the applicant referred to by applying the specific provision of the law. Regardless of the fact that the State did not have a possibility to act outside the law, it did have an option both to apply and to interpret the Convention.

This example clearly points to the conclusion that the above mentioned question posed by Ronald Dworkin was not solely of academic nature. In this specific case, the Court "gave permission" to the State to disregard its own legal rule, the application of which would be unjust (although it avoided using this term in the judgment, it was obviously the heart of the matter), and "invited the State" to exercise its own interpretation of the Convention and draw a legal rule which had not been stipulated until then either in the wording of the Convention or through the case-law.

According to the opinion of the authors, this is exactly where evolutive interpretation of human rights is revealed, meaning that there is an option a judge may resort to while resolving his/her ethical dilemma. The European Court had just established such a method of interpreting the provisions of the Convention in order to ensure the development of human rights in accordance with the current times and social and technological developments.[24] However, the very fact that a judge may resort to evolutive interpretation still does not mean

[24] Alessia Cozzi and Others - *Comparative study on the implementation of the ECHR at the national level*, Council of Europe, Belgrade, 2016, p.181-184

that his action of this kind will be in accordance with the principles of judicial ethics by which the judge shall be bound.

In our hypothetical case, had the judges applied the evolutive interpretation, they could have found that the application of the legal rule, which is manifested in the sentence of three years of imprisonment, was in contravention with Article 3 of the Convention, because the character of the sanction delivered was inhuman. The judges might have referred to the fact that the law did not distinguish between persons who produce narcotics for the sole purpose of sale and profit and those who do it for medical reasons, because it treats equally the persons who are in significantly different situations, which is contrary to Article 14 of the Convention, which prohibits indirect discrimination. At the same time, due to medical reasons, the domestic law allows for administration of some other narcotic drugs, which is not the case with cannabis oil.

Nonetheless, it would be far more difficult to provide a simple answer to the question whether this judge's action was in line with the Code of Ethics and the proclaimed judicial integrity. Integrity is the attribute of rectitude and righteousness.[25] Both terms point toward moral qualities. One could say that evolutive interpretation implies referring to specific moral principles in order to define the body of general legal rules, the like of provisions on human rights. If a judge is bound by judicial integrity to act in all situations, including his own conduct outside the court, not only in accordance with the law, but also in line with ethical rules, could he/she be denied an opportunity to incorporate moral elements when making judicial decisions? On the one hand, the evolutive interpretation is a challenging move, since the judge declines to apply the domestic legal rule. As a consequence, there is a risk of attracting undesired attention of the public and impair public confidence in the integrity of the judiciary, bearing in mind the duty of the judge to apply the law, and not to contradict it, or try to amend it through his/her decisions. On the other hand, this is not purely and simply the opposing the law situation. Namely, in this case, the judge is confident that application of the law in the specific case would be contrary to legal principles of higher legal order i.e. provisions on human rights which are incorporated in the Constitution and international treaties. Therefore, by applying the *lex superior derogat legi inferiori* principle, the judge makes an endeavour to remain within the principles of legality. Having in mind that it is the

[25] *Commentary on Bangalore Principles of Judicial Conduct*, op.cit., para. 101

role and duty of a judge to submit only to the Constitution and the law, one could not easily conclude that, in this specific case, this would mean violating any of the ethical principles.

However, in addition to already stated concern about the risk that, by its evolutive interpretation, the court has taken over the role of the legislator, a question may be posed whether the criminal court in our hypothetical case did have the power to interpret the provisions on human rights in such a manner. In practice, the evolutive interpretation is exercised by no other than the European Court of Human Rights, regardless of the fact that the Court, in the case of Thlimmenos, albeit between the lines, did offer a reasoning that the domestic court should have applied this method of interpreting the legal rule. Therefore, the application of evolutive method of interpretation might open the doors to legal uncertainty and judicial arbitrariness, where almost any rule and its application might, under certain circumstances, be questioned from the perspective of whatever might be considered just in the case under consideration. Also, and in spite of the fact that a judge might resort to evolutive interpretation for the sake of preventing indirect discrimination, his/her ethical duty would be to ensure equality of treatment to all appearing before the courts.[26] A question may be asked whether an exception from applying the law, due to its unjust character in an extreme case, would represent a violation of this principle in relation to all the other accused to whom this legal rule would otherwise be applied. On the one hand, a judge deviates from applying a legal norm exactly due to exceptional and extreme circumstances of the case to which it should be applied, unlike under the circumstances of other most common cases to which such a legal norm shall be applied. On the other hand, one of the definitions of justice is exactly the application of a certain legal rule in all such situations to which such a rule should apply, judging by its contents.[27] One might assess that, in this case, a judge is to choose between formal and substantive equality before the law.

6. Judicial subversion

One of the options that judges may resort to, when confronted with a profoundly unjust legal provision or a provision which, in a specific case, would generate unjust result is the so called "judicial subversion". This is a situation in which a legal norm is clear and does not leave any room for broad interpretations, and it is clear to a judge how it should be

[26] *Bangalore Principles of Judicial Conduct*, op.cit.,Value 5
[27] H. Kelsen - *General Theory of Law and State*, Harvard University Press, 1945, p.14

interpreted and applied to a specific case. However, the judge may realise that the particular outcome achieved in this way would be fundamentally unjust, and therefore opt to attach another meaning to the legal norm than the one he/she viscerally knows it carries.[28] Therefore, a judge may depart from a clear and commonly accepted application of the norm, which is widely used in practice, offering a reasoning which, the judge knows is incorrect from a strictly legal point of view, but is deeply convinced that it is in compliance with fundamental principles of justice and human rights.

This kind of "judicial subversion" should be distinguished from a creative interpretation of the law, which occurs when judges are confronted with ambiguous legal provisions or standards. In such situations, a judge is nevertheless expected to determine the proper meaning of insufficiently precise legal norm in each particular case. However, as already stated, "judicial subversion" is about precise and strict norms of imperative nature which leave not much space for different interpretations.

A special form of "judicial subversion" exists when there is a tendentious treatment of factual issues aimed at bypassing an unjust legal norm.[29] In this situation, the judge is aware that the facts of the case, determined by his conscientious assessment of presented evidence, will imply a legal norm which will result in manifestly unjust outcome. Consequently, the judge attaches more importance to certain facts than actually due while, on the other hand, minimises the importance of some other facts, and in this way the judge applies a more mitigating legal norm which, in judge's opinion, will bring the just result.

Although there is not much talk in public about this issue, this kind of "judicial subversion" is quite common in judicial practice. Namely, this kind of conduct represents a *judicial lying* of its own kind, where a judge delivers a decision he/she knows is not right from a strictly legal point of view. Therefore, as a rule, judges will not admit to having resorted to this method. Hence, it is not always easy to identify court decisions where judges resort to "judicial subversion". In fact, it would be fair to say that judges are most successful in this activity when, in their reasoning they manage to hide as much as possible that, in a specific case, they were fully aware of resorting to a different treatment of factual and legal issues in relation to other cases to which the same legal norm is due to be applied. In such a

[28] P. Butler - *When Judges Lie (and When They Should),* Minnesota Law Review, Vol. 91, 2007, p.1785
[29] M. B. Smith - *May Judges Ever Nullify the Law*, 74 Notre Dame Law Review, 1999, p.1660

case, it is more probable that the judicial subversion will pass unnoticed and it is less probable that they will attract unwanted attention of the public and critique on account of the judge who had knowingly broken the law, and therefore exceeded the powers of his judicial office. For all of the above mentioned, Ronald Dworkin suggested that it would not be wise to make this method a part of the theory of law, although he himself thought it was a necessity in certain cases.[30]

This begs a question of how a panel of judges could resolve our hypothetical case in the above stated manner. Judges might start from the fact that the subject criminal offence falls under the section of criminal offences against human health. Therefore, it is the human health which is the object of protection i.e. persons who produce narcotics are sanctioned exactly because they produce a substance which is harmful to human health. Conversely, in our hypothetical case, the defendant produced cannabis oil in order to improve his medical status. He did not do so in order to misuse a narcotic drug or to sell it to other people. Incidentally, his own manufacture of cannabis oil was an extorted solution, in view of the fact that the state did not provide this type of treatment to persons suffering from such grave illnesses. In terms of the subjective relationship of the defendant towards the criminal offence, judges might note that the defendant's intention was not to produce the narcotics as a detrimental substance which may be misused, but as a medication. Given such reasoning, the defendant would be freed of charges for committing this criminal offence. Although the stated reasons are more than relevant, they are still in contravention with the Criminal Code of the Republic of Serbia, which provisions stipulate that the intention with which a perpetrator commits a criminal offence is not relevant for the act of producing narcotics.[31]

Finally, of course, there is a question of bringing into line the proceedings with the principles of judicial ethics. Formally speaking, by applying this method the judge remains within the law. He does not nullify the domestic law in a manner in which a judge who would opt for evolutive interpretation of human rights would do. Only the legal professionals will be able to identify "judicial subversion" here, especially if the judge offered convincing arguments for his/her decision. On the other hand, it is more probable that such court's decision, in the eyes of the general public will be perceived as justice served. Therefore, one

[30] R. Dworkin, op.cit, p.327

[31] The answers of the Criminal Department of the Supreme Court of Cassation to disputed legal issues from the session held on November 14th, 2014, available at: https://www.vk.sud.rs/sites/default/files/attachments/10%20KO%2014.11.2014..pdf

might assume that this is the kind of practice that judges relatively frequently opt for in order to resolve their ethical dilemmas.

However, as already stated, "judicial subversion" represents a kind of judicial lying; since the judge knowingly makes a decision and offers corresponding reasoning, well aware that it is not in accordance with the commonly practised interpretation of a certain legal norm. In relation to this, it would be best to quote from the Commentary on the Bangalore principles, which stipulates that „*a judge should always, not only in the discharge of official duties, act honourably*" and „*be free from fraud, deceit and falsehood*", as well as that there are no degrees of integrity, and that it is absolute.[32] Likewise, the Bangalore Principles underline that a judge is duty bound to exercise the judicial function independently, and in accordance with a conscientious understanding of the law[33], which begs the question of whether in the case of "judicial subversion" we are talking about conscientious understanding of the law, or not. Therefore, one might consider that such an approach, on the one hand, contributes to delivery of a just decision with minimum damage to the external reputation of the judiciary while, on the other hand, it contradicts the ethical prerequisites of honest conduct and conscientious application of the law by a judge.

7. Resignation

One of the options that judges have at their disposal, and which is not that common in judicial practice, is to resign their post. The Commentary on the Bangalore Principles regarding conduct of judges who are confronted with the so called „*moral vs. formal*" dilemma offers exactly such a recommendation to judges. If a judge is duty-bound to apply the law, and the law is unjust or immoral, then it follows that the moral thing for the judge to do is resign.[34] The case known worldwide is that of Mahatma Gandhi who said the following to the judge before whom he had been summoned: "*The only course open to you, the judge, is as I am just going to say in my statement, either to resign your post, or inflict on me the severest penalty, if you believe that the system and law you are assisting to administer are*

[32] *Commentary on Bangalore Principles of Judicial Conduct,* op.cit., para. 101
[33] *Bangalore Principles of Judicial Conduct,* op.cit., Value 1, para. 1.1
[34] Joe W. Pitts II - *Judges in an Unjust Society: The Case of South Africa*, Denver Journal of International Law & Policy,Volume 5, Number 1 Spring, Symposium - International Business Transactions - Tax and Non-Tax Aspects, Article 20 May 2020, p.87

good for the people."[35] With these words, Gandhi showed that he had recognized the moral dilemma in which the judge who trialled his case found himself, and therefore he suggested two options to the judge – to apply the law, if the judge believed that the system and the law were good for the people, or to resign, hinting that the latter would be morally more appropriate in this specific case.

The above mentioned illustrates that the idea of resignation, when judges are confronted with ethical dilemmas is no novelty at all. Far back in 1840 in the USA, a part of the professional public demanded that judges opposing the institution of slavery should resign, and in this way rise against unjust slave owners' laws they were forced to apply.[36] Albeit rarely, it would happen from time to time in American judicial practice that a judge confronted with a profound ethical dilemma decided to resign. In relation to this, a well-known case is the one of the renowned Justice Robert F. Utter who became the youngest elected judge in the history of American judiciary, and who resigned from his judicial function on March 30, 1995, after 23 years on the Washington Supreme Court. He composed a formal letter that was sent to the governor, where he wrote: "*I have reached the point where I can no longer participate in a legal system that intentionally takes human life. (...) We are absolutely unable to make rational distinctions on who should live and who should die*."[37] Confronted with deeply unjust sanction of frequent practice of taking human life, Justice Utter eventually chose to resign. Throughout his carrier, Utter dissented in two dozen death penalty cases, while in public debates and discussions he persisted in his viewpoint that the law should be changed and the death penalty abolished. The resignation of Justice Utter had such a huge impact that a year after that, a symposium was organised in the USA on the role of morals in delivering judicial decisions. This panel posed some major questions like: what does constitute a violation of the judicial oath; what are the boundaries of civil disobedience; does disobeying the rules undermines judge's integrity, and all these questions, to some extent or even entirely, touch on the topic of the present paper. Other collocutors on the panel presented views that Justice Utter's resignation launched the issue of conscience *"in a dramatic and forceful way (...) and may very well have changed the terms of debate"* on

[35] Available at: https://www.mkgandhi.org/law_lawyers/25great_trial.htm
[36] Bruce Ledewitz - *An Essay Concerning Judicial Resignation and Non-Cooperation in the Presence of Evil*, Duquesne Law Review,Volume 27, Number 1, Article 3, 1988, p.1
[37] "*Robert F. Utter*", Research by John Hughes and Lori Larson, Transcripti on by Lori Larson, Interviews by John Hughes, available at https://www.sos.wa.gov/legacy/stories/robert-utter/pdf/complete.pdf

capital punishment in America.[38] Such an observation proved to be correct, having in mind that after the Justice Utter's decision, death sentences in America have declined more than 60 percent. After the resignation, Justice Utter continued to work on the USA Government projects, on strengthening the integrity of judges throughout the world, teaching courses to judges in Asia and in Eastern Europe to emerging democracies. A sentence he used to explain his personal decision to resign still resonates: *„At certain times, the simple refusal to do the wrong thing is the closest one can come to the true rule of law"*.

However, there are opposing views on resignation as a way of resolving moral dilemmas. According to some authors, the practical issue with resignation is that it will remain "an ineffective means of helping those victimized by unjust laws". "*If the virtue of resignation is that it avoids both the violation of the judicial oath and the application of oppressive law, the vice is that it probably will be ineffective, because other judges will apply that law. Resignation is not morally pure, either*."[39]

It is correct to say that, by offering resignation, a person affected by unjust laws will not be spared of its application, because the resigning judge will be replaced by another one who will be required to apply the enacted law. Nevertheless, according to the opinion of the authors of this paper, the very act of resigning on account of moral grounds is definitely challenging exactly for the reason it represents an act of rebellion against injustice, and one does rebel against injustice publicly, but in a noble and dignified manner. At the same time, one rises against injustice by scarifying own well-being – his/her career, but safeguarding own judicial integrity, as well as integrity of the entire judiciary. In such a case, a judge leaves the judicial office, but his/her professional career remains unbelimished, and the very act of resignation may serve as a driver of change regarding unjust legal provisions and its amendments and supplements, like in the case of Justice Utter. On the other hand, it is obvious that by the act of resignation, in this specific case, justice as such would not be served, but it would be left to another judge to resolve the same dilemma in his/her own way. Still, althgouh the judge leaves his/her judicial function, as an ultimate measure, resignation as such leaves a deep impact on judicial practice, which will induce the moral dilemma in other judges with regard to unjust laws and it will raise the level of sensitivity and judicial integrity in the process of delivering decisions.

[38] Ibid.
[39] Joe W. Pitts II, op.cit., p.87

8. Conclusion

The full burden of ethical dilemma that judges are confronted with in delivering a decision in the given hypothetical case is reflected in elaborated *pros* and *cons* with regard to its impact on integrity of judges and the judiciary, respectively. The studies on this topic so far have mainly dealt with the position of a judge in totalitarian regimes i.e. situations when the judge is forced to make a choice between immoral law and moral lawlessness. However, our hypothetical case shows that judges in today's Europe are also confronted with this ethical dilemma, due to imperfections of the law and extreme circumstances of the case that might fall within its range of application.

Certainly, a judge should primarily be aware of his/her privileges, as well as duties and burden, to be subjected only to the Constitution and the law. By taking the judicial office, the judge demonstrated readiness to sacrifice personal opinion on a certain case for the sake of due application of the law, but also to disregard the opinion of the general public and refrain from taking alliance with the general public, simply because they represent the opinion of the majorty. On the other hand, integrity of a judge calls for faireness, awareness of social circumstances and changes, but also of consequences of judge's own decisions. A judge must be brave, have broad views and in his work must endeavour to serve justice and protect individual rights and freedoms. The dilemma arises when the judge should decide which of these values shall prevail in delivering the decision. In fact, it would be fair to say that it is up to the judge to make a fine balance and reconcile all of the mentioned values. Since the very ethical dilemma is a difficult one, so will any decision a judge may deliver be, from the aspect of sacrificing one set of values so that some other may be achieved. The answer to the question which decision is right or appropriate in cases of this nature will never be easy. However, the acknowledgment of this ethical dilemma, and a balance achieved between the stated values represents a safe indicator that judges are aware of their position and duties, which is also a safe indictor of their integrity.

Nontheless, it is the opinion of authors of this paper that boundaries of judicial ethics are broader than the boundaries of legality. In fact, the totality of individual and collective qualities that judges integrity implies indicate that it cannot be reduced solely to the duty of mere application of the law. Therefore, it is our opinion that a judge is obligated to search for

a solution which would reconcile legality and justice. In search of a just solution, a judge should not be limited by the law's usual rigor in its application, particularly in cases which have not been appropriately recognised in the law itself. In such cases, the judge must act as a necessary corrective for imperfections of a specific law, sticking by the fundamental principles of justice – that persons in equal situations are treated with equality and/or to prevent equal treatment of persons under different situations. The authors of this paper share the view that such treatment does not undermine judicial integrity; on the contrary, it reinforces it. If the foundations of judicial decisions are strong, judicial integrity can only be enhanced, and in this way it shall surpsass all obstances that it may encounter along the way. This is the strong duty of each judge individually, and of the entire judiciary to ensure.