

Interpretation of the Evaluative Concept of Integrity as a Part of Judge Selection and Qualification Evaluation Practice (iThenticate Similarity Report)

Interpretation of the Evaluative Concept of *Integrity* as a Part of Judge Selection and Qualification Evaluation Practice

ABSTRACT

By analyzing the latest scientific and practical studies, the author examines the interpretation of the evaluative concept of *integrity* in the judge selection and qualification assessment practice. The author emphasizes that the absence of a legislative definition of the evaluative concept of *integrity* in the selection and qualification assessment practice does not mean that this concept does not meet the requirements of legal certainty. Both legislators and judiciary bodies and court practices build this concept. Numerous issues of its interpretation remain unresolved, which in some cases may indicate that the legal assessment of an applicant for a juridical vacancy or a judge during the relevant procedures is unclear and unpredictable. Approval of the united criteria of *integrity* definition will help unify the practice of applicant selection for a juridical vacancy and make the application of this evaluative concept more understandable and transparent. The author mentions that only the approval of the united criteria of the *integrity* evaluative concept definition will not solve all the problems with its explicit application. To unify this practice, hundreds of practical questions of judges/applicants for juridical vacancies must get approved answers. Therefore, the High Council of Justice must provide answers to very specific questions to integrity and publish them in a handbook.

Keywords: integrity; evaluative concepts; integrity criteria; High Council of Justice

INTRODUCTION

The evaluative concept of *integrity* applied by the judge and applicant for a juridical vacancy evaluation can be initially associated with the *New Testament Parable of the Talents* about two different servants: one, good and faithful, and the other, unfaithful and lazy¹. The teaching of this parable is that it is not enough to be a good specialist only or to have positive human qualities only. It must be both. Both intellectual and moral criteria, i.e., professionalism and human qualities, mentioned in the Bible and used by the Public Integrity Council (PIC), Public Council of International Experts (PCIE), Ethics Council, High Qualification Commission of Judges of Ukraine (HQCJU), and High Council of Justice (HCJ).

Worth mentioning are the newest practical works, the authors of which analyze the evaluative concept of *integrity*: Research on Practices in Application of the *Integrity* Category for the Selection and Qualification Evaluation of Judges. Analytical Report (February 2024, Washington: Olena Ovcharenko, Anna Sukhova, Marta Hlomb)²; Analysis of the High Council of Justice's Practices in Evaluating the Behavior of a Judge/Applicant for a Juridical Vacancy by the Integrity and Professional Ethics Requirements (October 2023, Kyiv: Buromenskyi M.V.)³; High Council of

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¹ Matthew 25:14–30.

² Research on Practices in Application of the *Integrity* Category for the Selection and Qualification Evaluation of Judges. Analytical Report (February 2024, Washington: Olena Ovcharenko, Anna Sukhova, Marta Hlomb), 135 p.

³ M. V. Buromenskyi, *Analysis of the High Council of Justice's Practices in Evaluating the Behavior of a Judge/Applicant for a Juridical Vacancy by Integrity and Professional Ethics Requirements* (October 2023, Kyiv) https://hcj.gov.ua/sites/default/files/field/file/analiz_praktyky_vrp_shchodo_kryteriyiv_ocinky_etyky_i_dobrochesnosti.pdf

⁴ Justice 2.0: Reboot (analysis of competitive selection for vacant positions and evaluation of the current members) (October 2023, Kyiv: Kh. Burtnyk, T. Chyzhyk)⁴; Analysis of Practices in Evaluating Judges/Applicants for Juridical Vacancies by the Integrity and Professional Ethics Requirements (September 2023, Kyiv: HQCJU)⁵; Generalization of the Public Integrity Council's Practices for 2019 (2020, Kyiv: Sereda M.L.). Generalization of the Public Integrity Council's Practices in Analysis of Meeting the Professional Ethics and Integrity Requirements by the Applicants for the Supreme Court Juridical Vacancies (2018, Kyiv: edited by Halyna Chyzhyk)⁶.

Each of the above papers brings a clearer understanding of the concept of *integrity* and clearly demonstrates that the absence of its legislative definition does not mean that this concept ³ does not meet the requirements of legal certainty. Both legislators and judiciary bodies and court practices build this concept. Numerous issues of its interpretation remain unresolved, which in some cases may really indicate that the legal assessment of an applicant for a juridical vacancy or a judge during the relevant procedures is unclear and unpredictable.

The authors aim to examine the interpretation of the evaluative concept of *integrity* as a part of judge selection and qualification evaluation practice.

The methodology of ²¹ the research is based on general scientific and special legal methods, in particular, ⁶ the dialectical method, systems analysis, and theoretical generalization. They all have been used during the analysis of the application of the evaluative concept of *integrity* as a part of judge selection and qualification evaluation practice.

RESEARCH AND RESULTS

The concept of *integrity* is evaluative, so its meaning, like any other evaluative concept, is determined by considering specific circumstances⁷. To understand it, subjective notions and human qualities, their experiences, values, moral qualities, religious beliefs, and worldviews are of great importance⁸. We also want to emphasize how significantly society's functioning impacts the evaluative concept of *integrity* standards. For example, travel to the temporarily occupied regions of Ukraine or the aggressor country has not been counted as something illegal or a circumstance characterizing a person's integrity before the full-scale Russian invasion. In this context, there will always be different approaches to how to do a proper interpretation of "integrity."

⁴ Kh. Burtnyk, T. Chyzhyk, *High Council of Justice 2.0: Reboot* (analysis of competitive selection for vacant positions and evaluation of the current members) (October 2023, Kyiv) <https://drive.google.com/file/d/11v-SEgOw3axw9AY-25DeOjm63JwkmdV1/view>

⁵ Analysis of the Practices in Evaluating the Behavior of a Judge/Applicant for a Juridical Vacancy by the Integrity and Professional Ethics Requirements https://vkksu.gov.ua/sites/default/files/field/file/analiz_praktyky_ocinky_vidpovidnosti_suddiv_i_kandydativ_na_posadu_suddi_kryteriyam_dobroch_esnosti_ta_profesiyanoi_etyky.pdf

⁶ Generalization of Public Integrity Council's Practices in Analysis of Meeting the Professional Ethics and Integrity Requirements by the Applicants for the Supreme Court Juridical Vacancies. Kyiv, 2018, 26 p. <https://grd.gov.ua/wp-content/uploads/2020/08/Uzagalnennia-praktyky-GRD.pdf>

²⁰ O. Rybalko, Estimates in the criminal procedural law of Ukraine: monograph. Lviv: Lviv State University of Internal Affairs, 2017, pp. 9–26. <https://dspace.lvduvs.edu.ua/bitstream/1234567890/2468/1/rybalko%20monogr.pdf>

⁸ V. O. Rybalko, A. O. Rybalko, N. Ye. Makovetska, A. V. Prylutska, Interpretation of evaluative concepts in the High Council of Justice's Practice: monograph. Lviv: Publisher: Viktoriia Kundelska, 2022, 216 p.

According to the Handbook for Judicial Nominating Commissioners, the evaluative concept of *integrity* is interpreted through such terms as *honesty, probity, ethical behavior, and adherence to high moral principles*⁹. According to the Central and Eastern European Law Initiative (CEELI) in Prague, integrity is an *internal human quality and acting based on certain principles and values*¹⁰.

According to V. Fedorovych, the evaluative concept of *integrity* must be interpreted by using such terms as *professional honesty, dignity, fairness, tactfulness, and professional duty*¹¹. At the same time, O. Hryshchuk believes it would be *moral qualities and adherence to ethical standards*¹². To describe the concept of *integrity*, S. Hlushchenko used the following terms: *honesty, truthfulness, probity, personal dignity, sincerity, good faith, modesty, openness, and transparency*¹³, and S. Zhukov interpreted it with *high ethical standards, in particular, professionalism, competency, independence, impartiality, and probity*¹⁴.

According to the Basic principles of the PCIE, *integrity* is evaluated with such terms as *morality, honesty, and probity*. The PIC Indicators evaluate *integrity* with *independence, impartiality, honesty, probity, adherence to ethical standards, equality, and diligence*¹⁵.

Based on the above definitions, *integrity* is interpreted with the help of other evaluative concepts. However, defining one evaluative concept through others does not ease its understanding¹⁶.

During a webinar for judge assistants, *Actual Problems of Prevention and Fighting the Corruption in Ukraine, Legal Regulation of the Conflict of Interest, and Ensuring Integrity*, organized by the National Juridical School of Ukraine on February 27, 2024, the co-author of this article offered judge assistants to pass a survey. Ninety-six judge assistants of all levels took part. According to its results, 70.8% of respondents lack a legislative definition of the evaluative concept of *integrity*, and only 29.2% showed no interest in such a definition in a law.

Should there be an official definition of *integrity* in the legislation?

96 responses

- No, since *integrity* is not a legal category but a moral and ethical one. Any such definition

⁹ A. Kulibaba, *The Concept of Integrity as a Key Criterion during the Selection of Applicants for Judge Vacancies*. Entrepreneurship, Economy, and Law, 2018, No. 2, pp. 212–217.

¹⁰ Ibid.

¹¹ V. Fedorovych, *General Theoretical Approaches to Determining Dishonest Behavior of a Judge in the National Anti-Corruption System*. National Law Journal: Theory and Practice, 2015, No. 6, pp. 14–17.

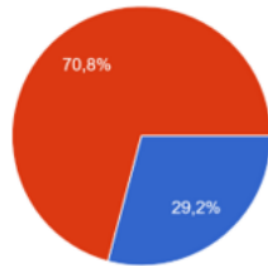
¹² O. Hryshchuk, *Judicial Integrity through the Lens of Modern Social Transformations*. The Word of National Juridical School of Ukraine, No. 1 (30), 2022, p. 20.

¹³ S. Hlushchenko, *Novels of Judicial Reform: Concept of Judicial Ethics and Integrity in Context of Qualification Evaluation of Judge (Candidate on Position of Judge)*. Journal of Civil and Criminal Procedure, 2016, No. 6, pp. 70–83

¹⁴ S. Zhukov, *Administrative and legal support for the integrity of judges: Problems of theory and practice. Qualification scientific work on the rights of the manuscript*. pt. Kyiv, 2019, p. 407.

¹⁵ Analysis of the High Council of Justice's Practices in Evaluating the Behavior of a Judge/Applicant for a Juridical Vacancy by the Integrity and Professional Ethics Requirements—October 2023, Kyiv, p. 7

¹⁶ V. O. Rybalko, *Integrity in the criminal procedural law of Ukraine*. Zaporizhzhia, 2016. Qualification scientific work on the rights of the manuscript: 12.00.09. P.8. 20. http://virtuni.education.zp.ua/info_cpu/sites/default/files/aref_Rybalko.pdf



would be too general and too discrete. It is more important to establish a practice of use of this concept.

- Yes, since its **25**ence in the current legislation causes a violation of the principle of legal certainty.

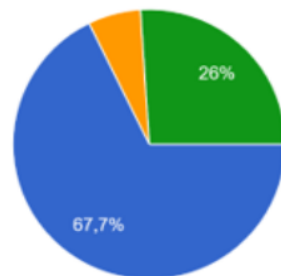
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At the same time, it is worth mentioning, despite the results of the survey conducted at the beginning of the webinar, closer to its end, the participants discussed not some theoretical issues regarding a more precise definition of the evaluative concept of integrity but specific cases of behavior that could be considered integral or non-integral. It is another confirmation of Miroshnychenko A.M.'s idea that interpreting evaluative concepts is a matter of practice, and a list of cases of their application would make more sense than an abstract discussion about their meaning¹⁷.

Assisting lawyers asked different questions: *“Does a positive conclusion about the non-integral behavior of a judge have to influence the career of their assistants? Does the Juridical Ethics Code include the actions of retired judges? Would a positive conclusion about the non-integral behavior of an applicant for a judge vacancy automatically mean their non-integrity for new competitions in the future?”* These and hundreds of other questions about which kind of behavior of judges/applicants for judge vacancies confirm their non-integrity remain controversial. However, the mentioned survey contained some open questions for judge assistants.

A judge has been confirmed to be non-integral. Must this influence the future career of their assistants applying for judge vacancies?

96 responses



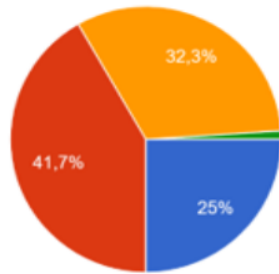
- No, if the assistants didn't take any part in the illegal activities of the judge, they mustn't experience any negative consequences of a court's decision regarding the judge.
- Yes. A judge assistant works on draft decisions, so if a judge was charged for making a non-motivated or clearly illegal decision, it is also clear that the assistant was aware of it.
- It all depends on the assistant's involvement and awareness, particularly whether the assistant pointed out the illegality of specific procedures or decisions made by the judge.
- The assistants aren't responsible for anything.

Does the Code of Juridical Ethics also cover the activities of retired judges?

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¹⁷ A. M. Miroshnychenko, *Judicial Discretion, Miscarriage of Justice, and Judicial Arbitrariness (through the Lens of Legal Liability of Judges)*. Scientific and practical manual. Kyiv. Jurincom Inter, 2020, p. 31

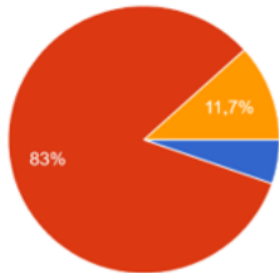
96 responses



- No.
- Yes, however, such judges cannot be charged with disciplinary offences.
- There should be defined a judge discharge procedure in the case of violating ethics rules in the legislation.
- Retired judges cannot be charged with disciplinary offences under any circumstances, and there cannot be any exceptions.

A person is confirmed non-integral while nominating for a specific judge vacancy. Does it mean the person must be automatically proclaimed non-integral for all future nominations?

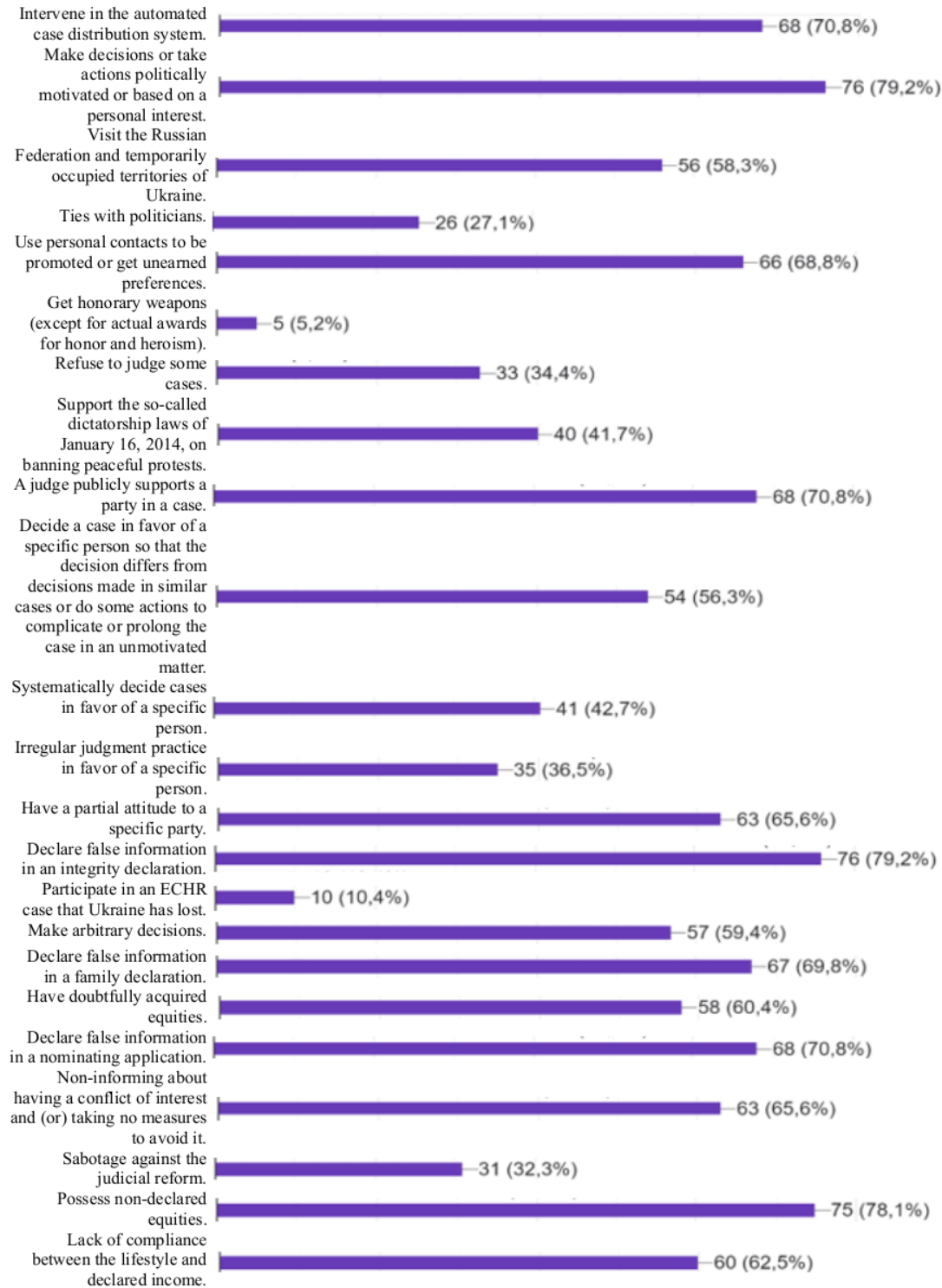
94 responses

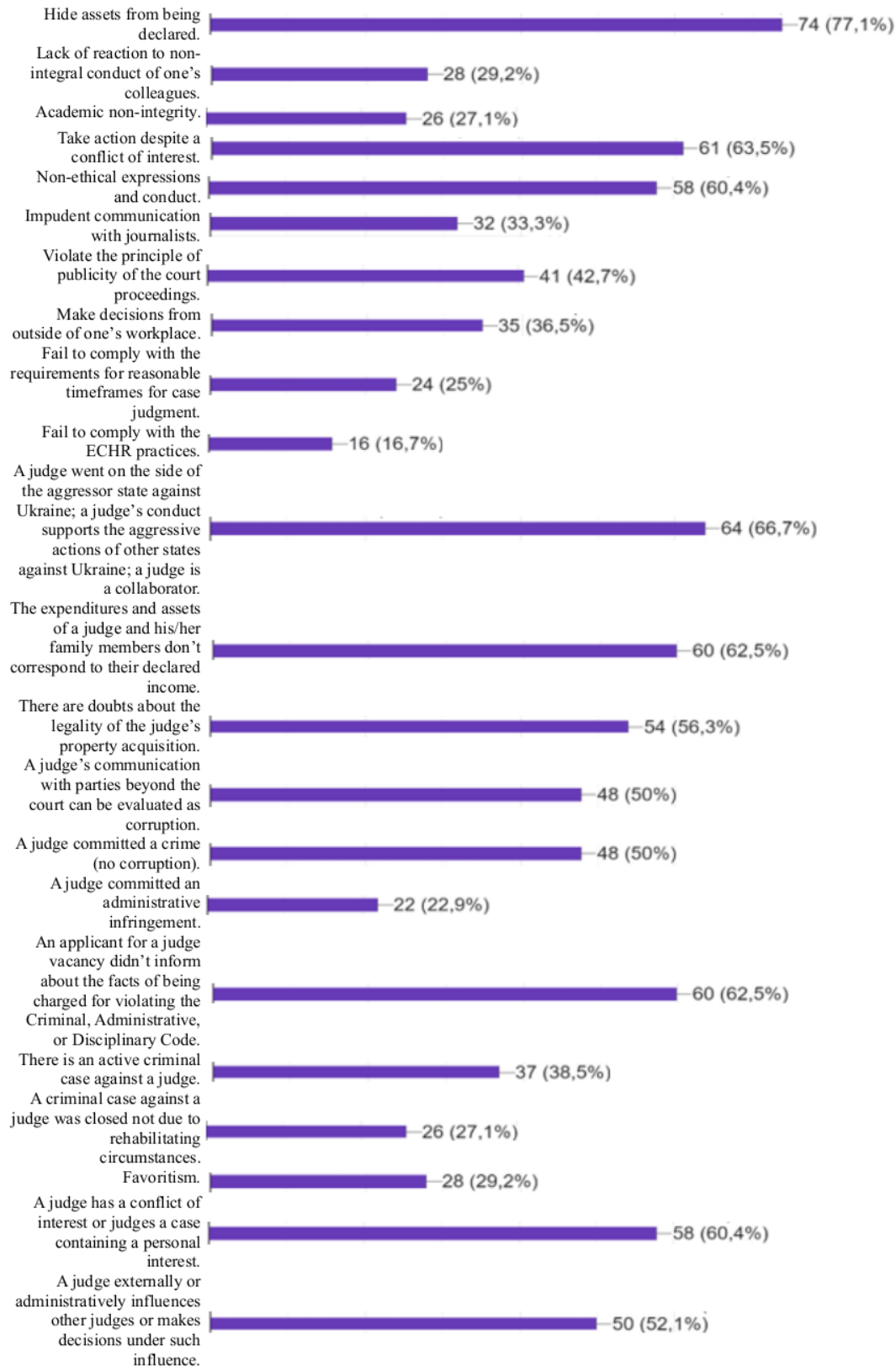


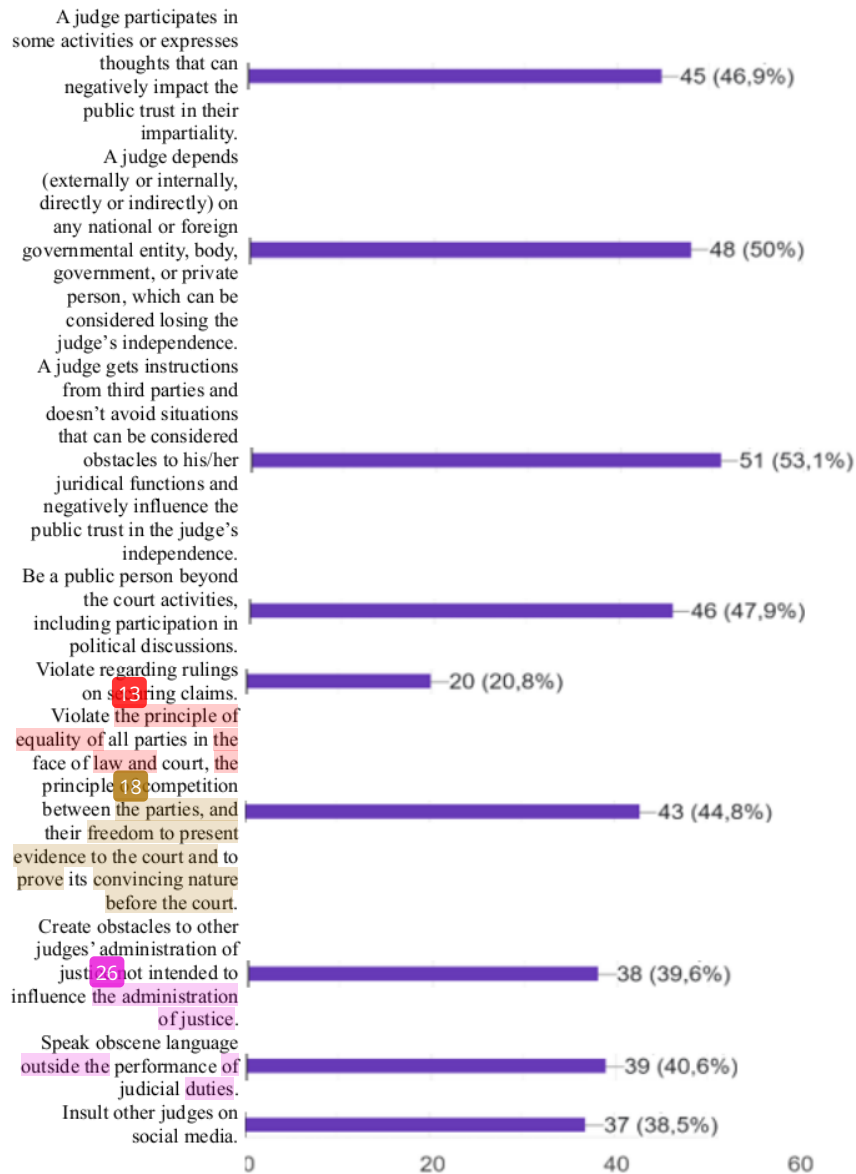
- Yes.
- No, since certain circumstances could not exist anymore (conviction spent; previously non-declared assets later declared; integrity criteria changed, etc.).
- No, since we cannot do it like in the Soviet times when there were "politically unreliable people."

Which of the following conduct examples speak for the non-integrity of judges/applicants for judge vacancies?

96 responses







Different answers in the above pictures can be explained by the fact that the PIC, PCIE, HQCJU, and Ethics Council still use different *integrity* criteria.

The PIC applies *Indicators if a Judge (an Applicant for a Judge Vacancy) Doesn't Meet the Criteria of Integrity and Professional Ethics* revised by a PIC resolution of December 16, 2020. This document has a similar structure to ¹⁹the *Bangalore Principles of Judicial Conduct* of May 19, 2006¹⁸. Based on these principles, the PIC evaluates *integrity* by the following criteria:

- 1) independence;
- 2) impartiality;

²⁹ ³
¹⁸the *Bangalore Principles of Judicial Conduct* of May 19, 2006 https://zakon.rada.gov.ua/laws/show/995_167#Text

- 3) honesty and probity;
- 4) adherence to ethical standards;
- 5) equality;
- 6) and diligence¹⁹.

The PCIE follows the *Basic principles of the Public Council of International Experts regarding integrity, knowledge, and skills of applicants for the Anti-Corruption Court judge vacancies* adopted by the Protocol No. 4 of December 28, 2018. The PCIE evaluates one's *integrity* by two criteria with their own indicators:

Criterion 1—*Integrity (morality, honesty, and probity)*—has the following indicators: Indicator 1 — material well-being; Indicator 2 — obligation to declare their well-being; Indicator 3 — independence; Indicator 4 — professional ethics; Indicator 5 — violating other regulations; Indicator 6 — worth to be a judge;

Criterion 2—*Knowledge and skills to judge cases*—has the following indicators: Indicator 7 — knowledge of anti-corruption means; Indicator 8 — complicated cases; Indicator 9 — juridical activities²⁰.

The HQCJU follows the *Regulation about the Order and Methods of Qualification Evaluation, Indicators of Meeting the Qualification Evaluation Criteria, and Means to Set the Criteria* adopted by the HQCJU Resolution of November 3, 2016 No. 143/zp-163a. The HQCJU evaluates one's *integrity* by the following criteria:

- 1) Whether expenditures and assets of a judge and his/her family members correspond to their declared income;
- 2) Whether the way (level) of living of a judge and his/her family members corresponds to their declared income;
- 3) Whether the behavior of a judge corresponds to the anti-corruption legislation;
- 4) Whether there are circumstances according to Points 1, 2, 9–12, 15–19 Section 1 Article 106 of the Law of Ukraine “On the Judiciary and the Status of Judges”;
- 5) Whether a judge has been brought to justice for committing offences or crimes indicating the judge's non-integrity;
- 6) Whether a judge has non-secured material liabilities that can have a substantial impact on his/her way of judgment²¹.

¹⁹ *Indicators if a Judge (in Applicant for a Judge Vacancy) Doesn't Meet the Criteria of Integrity and Professional Ethics* revised by a PIC resolution of December 16, 2014 <https://grd.gov.ua/wp-content/uploads/2020/12/Indykatory-HRD-vid-16.12.2020.pdf>

²⁰ *Basic principles of the Public Council of International Experts regarding integrity, knowledge, and skills of applicants for the Anti-Corruption Court judge vacancies* adopted by the Protocol No. 4 of December 28, 2018.

²¹ *Regulation about the Order and Methods of Qualification Evaluation, Indicators of Meeting the Qualification Evaluation Criteria, and Means to Set the Criteria* adopted by the HQCJU Resolution of November 3, 2016, No. 143/zp-163a https://old.vkksu.gov.ua/userfiles/doc/poriadok_ta_metod.pdf

The Ethics Council follows the *Evaluation methods for the HCJ members/candidates to the HCJ by the professional ethics and integrity criteria* adopted by the Resolution of the Ethics Council of December 9, 2021, No. 5. According to Point 1.3 of the Evaluation methods, the *integrity* indicators are

- 1) independence — self-reliance by decision-making, ability to make independent judgments while being under different kinds of pressure;
- 2) honesty — having high moral qualities and being truthful in professional and everyday life;
- 3) impartiality — lack of negative or positive pre-formed subjective thoughts or attitudes to someone or something, ability to make impartial, fair, objective judgments despite having some sympathy, antipathy, or shared opinions;
- 4) good faith — accurate, careful, and responsible performing one’s duties, indicating professional integrity²².

And it is not only about different structures of the regulations the PIC, PCIE, HQCJU, and Ethics Council are guided by. It is about their unequal practices. The reason is that these entities differently evaluate the importance of one or another violation while evaluating whether a judge or an applicant for a juridical vacancy satisfies the *integrity* indicators. For example, during the competition with 120 juridical vacancies at the courts of cassation of the Supreme Court announced on November 7, 2016, the HQCJU confirmed 38% of PIC’s conclusions regarding applicants who didn’t correspond to the professional ethics and integrity criteria. The HQCJU acknowledged that such a low level of confirmation speaks for differences in evaluating the same events and the absence of the united criteria for the grade of the manifestation of such events²³.

Judges and applicants have a right to understand what claims they may face.

To have the same practice of the application of *integrity* criteria (standards or indicators), the HCJ created a workgroup on February 8, 2024, to develop the United indicators for estimating the integrity and professional ethics of judges (applicants for juridical vacancies)²⁴. After consultations with the High Qualification Commission of Judges of Ukraine, the Juridical Council of Ukraine, and the Public Integrity Council, the HCJ got empowered to approve the United indicators for estimating integrity and professional ethics of judges (applicants for juridical vacancies) as amended the Law of Ukraine “On the High Council of Justice” in December 2023²⁵. The development and approval of the

²² Evaluation methods for the High Council of Justice members/candidates to the High Council of Justice by the professional ethics and integrity criteria https://ec.court.gov.ua/userfiles/media/new_folder_for_uploads/ec/methodology_EC.pdf

²³ Analysis of the Practices in Evaluating the Behavior of a Judge/Applicant for a Juridical Vacancy by the Integrity and Professional Ethics requirements https://vkksu.gov.ua/sites/default/files/field/file/analiz_praktyky_ocinky_vidpovidnosti_suddiv_i_kandydativ_na_posadu_suddi_kryteriyam_dobroch_esnosti_ta_pr_8_sinyoyi_etyky.pdf

²⁴ Resolution of the High Council of Justice of February 8, 2024, No. 375/0/15-24 “On creation of a workgroup to develop the United indicators for estimating the integrity and professional ethics of judges (applicants for juridical vacancies)” <https://hcj.gov.ua/doc/doc/43695>

²⁵ Law of Ukraine “On amendments to the Law of Ukraine “On the Judiciary: the Status of Judges” and some other laws of Ukraine regarding the improvement of juridical career-related procedures” of December 9, 2023, No. 3511-IX <https://zakon.rada.gov.ua/laws/show/3511-20#n326>

28 united criteria (indicators) for estimating integrity and professional ethics are also mentioned in the State Anti-Corruption Program 2023–2025²⁶.

DISCUSSION AND CONCLUSIONS

Approval of the united criteria of *integrity* definition will help unify the practice of applicant selection for a juridical vacancy and make the application of this evaluative concept more understandable and transparent. At the same time, we believe that only the approval of the united criteria of the *integrity* evaluative concept definition will not solve all the problems with its explicit application. To unify this practice, hundreds of practical questions of judges/applicants for juridical vacancies must get approved answers. Therefore, we think the High Council of Justice must follow the example of the National Agency on Corruption Prevention (that adopted the up-to-date *Clarifications on Financial Integrity*)²⁷ and adopt clarifications on the integrity of judges/applicants for juridical vacancies for corresponding procedures. The results of such work can be published as a practical handbook, as in the case of the generalization of disciplinary practices²⁸.

In our opinion, future studies on the evaluative concept of *integrity* will contain both theoretical researches dedicated to the delimitation of the evaluative concepts of *professional ethics* and *integrity* and specific practical requests on its application.

For example, judges and applicants for juridical vacancies must understand in which cases the information about their expenses and their correspondence to the income would be considered unconvincing; which violations against the procedure rules would be considered substantial; which violation against the professional ethics would indicate that an applicant doesn't meet the integrity requirements; which sources of information and time or territorial limitations effect the evaluation process.

Important further research areas for the evaluative concept of *integrity* are the development of tools for verifying information about judges and judicial candidates; development of recommendations for evaluating judicial candidates coming from the academic and lawyer communities. It is important to study the evaluative standard of proof, namely *reasonable doubt*, recently introduced by the Law of Ukraine “On the Judiciary and the Status of Judges,” previously used in practice by judiciary bodies and competition commissions but only adopted in a law in December 2023.

²⁶ Resolution of the Cabinet of Ministers of Ukraine of March 4, 2023, No. 220 “On the approval of the State Anti-Corruption Program 2023–2025” <https://zakon.rada.gov.ua/laws/show/220-2023-%D0%BF#Text>

²⁷ CLARIFICATIONS ON FINANCIAL INTEGRITY: Application of specific provisions of the Law of Ukraine “On Corruption Prevention” regarding the measures of financial control (submitting declarations, informing about substantial changes in material well-being, informing about opening a bank account in a foreign currency) November 13, 2023, No. 4 (as amended) <http://surl.li/rprxk>

²⁸ The generalized practice of the High Council of Justice and its disciplinary branches in reviewing disciplinary cases involving judges (based on the cases for 2017–2021) has been published by the High Council of Justice according to the Resolution of December 14, 2023, No. 1315/0/15-23. <https://hcj.gov.ua/sites/default/files/field/1012-3-web.pdf>

Further studies of the concept of *integrity* and its application in competitions should combine the analysis of specific manifestations of the behavior of applicants for juridical vacancies with the relevant criteria characterizing and determining such compliance with their activities and behavior.

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⁷ Resolution of the Cabinet of Ministers of Ukraine of March 4, 2023, No. 220 “On the approval of the State Anti-Corruption Program 2023–2025” ¹⁰ <https://zakon.rada.gov.ua/laws/show/220-2023-%D0%BF#Text> (25.04.2024)

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⁸ Resolution of the High Council of Justice of February 8, 2024, No. 375/0/15-24 “On creation a workgroup to develop the United indicators for estimating the integrity and professional ethics of judges (applicants for juridical vacancies)” <https://hcj.gov.ua/doc/doc/43695> (12.04.2024)

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