

THEMIS Competition 2016 – Semi Final D
Judicial Ethics and Professional Conduct



JUDICIAL ETHICAL VALUES AND THEIR ENFORCEMENT
THEORY INTO PRACTICE



Team Hungary

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“Educating the mind without educating the heart is no education at all.”

(Aristotle)

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1. Theoretical basis

1.1. The importance of judicial independence

Separation of powers is often referred to as one of the most important state organizing principles in a democracy. The powers are typically divided into legislative, executive and judicial branches. In a parliamentary system, such as in Hungary, a kind of fusion of executive and legislative branches can often be encountered. In order to prove this, it is enough to refer to the fact that the legislative body nominates the members of the executive body. The main idea behind the separation of powers is to prevent the fusion of powers and provide “checks and balances” between the branches. As a result of the unification described previously, the role of the judiciary in preventing other branches from exercising the core functions of each other is extremely important.¹ According to Article 6 of the European Convention of Human Rights, independence of the judiciary is the cornerstone of the right to a fair trial, and independence cannot be complete without a perfect separation of the judiciary from other branches.²

Relying on the theory of separation of powers, judicial independence applies both to judiciary as an institution, as a system, and to the individual judge who rules on specific cases. The 2016 EU Justice Scoreboard verifies this division as well and distinguishes between perceived judicial independence and structural independence.³

In their oaths, judges commit themselves to respect the constitution and the laws and to be impartial and conscientious when they practice their judicial power. In the course of their judicial activity, judges are bound by written law, but the effect of morals and ethics are beyond dispute.⁴ In order to ensure independence of judges, there is a need for stricter moral principles to apply in both their professional and private lives. The protection of the rule of law and the prestige of the judiciary are both factors that demand that only those shall practice as judges who are able to undertake themselves to this “way of life”.

¹ BADÓ Attila: A bírói függetlenség, a tisztességes eljárás és a politika. Gondolat Kiadó, Budapest, 2011, p. 14

² BÁRD Károly: Emberi jogok és büntető igazságszolgáltatás Európában. Magyar Hivatalos Közlönykiadó, Budapest, 2007., p. 105

³ http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf

⁴ KONDOROSI Ferenc – UTTÓ György – VISEGRÁDY Antal: A bírói etika és a tisztességes eljárás. Magyar Hivatalos Közlönykiadó, Budapest, 2007., p. 8

In addition to the preceding, we need to mention that independence is not only a privilege, but it is an obligation as well. Those who bear this kind of independence need to accept extraordinary ethical responsibilities.

Another important factor is that society claims the right to itself to exercise control above the judiciary, and the act of a single judge can easily be identified as the act of the whole organization. This tendency is enhanced by the development of information freedom and, as a result of this, the judicial system becomes more and more visible for the society. Based on the 2016 EU Justice Scoreboard, judicial independence is vital for upholding the trust of citizens and businesses in the legal system.⁵ This circumstance justifies as well the need for principles that can be further guidelines –in addition to the laws – for judges in their everyday lives.

To summarize the preceding, we can state that every society and all international bodies, tribunals and courts shall endeavor to build and maintain the culture of judicial independence that is essential for democracy, liberty, rule of law and human rights and is a necessary foundation for orderly world trade, globalized markets and beneficial international investments.⁶

1.2. Definition of morals and ethics

For a better understanding, there is a need to lay down some basic definitions and draw a distinction between some of them.

The word ethics derives from the ancient Greek word *éthos*. The subject of ethics is the problems of morals and morality. The main difference between ethics and morals is that ethics is not dealing with certain actions, but it rules the acts of individuals on a higher level, the so called *meta* level, and it reflects to acts on a theoretical way. When it comes to morals, we mean rules and values which are generally recognized and compulsory for a group of people. In general, we can state that moral is developed over time in a society.⁷

The term ethics refers to rules of behavior based on ideas about what is morally good and bad. Ethics is a philosophical area of study, a set of principles dealing with ideas related to correct and incorrect behaviors, based on a solid moral background. Ethical rules applicable for certain professions are referred to as professional ethics, and if we gather these rules, we come to the

⁵ http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf

⁶ http://ceeliinstitute.org/wp-content/uploads/2015/07/FULL_VERSION_FINAL_update_february_2016_new.pdf

⁷ KONDOROSI Ferenc – UTTÓ György – VISEGRÁDY Antal: A bírói etika és a tisztességes eljárás. Magyar Hivatalos Közlönykiadó, Budapest, 2007., p. 34

code of ethics, which is a guide of principles designed to help a group of people or professionals to behave and work honestly and with integrity. A code of ethics, as a document, outlines the mission and values of the concerned organization, how professionals are supposed to approach problems and defines the ethical principles based on the organization's core values and the standards.

The judges' code of ethics is a specific collection of profession related ethical rules applicable for judges which contains the ethical principles of the judiciary, based on the core values of the judicial system. The main difference between this code and the other profession related codes of ethics is that the one applicable for judges stipulates rules for not only labor hours but for free time as well. The aim of this code is not only to set down various recommendations and prohibitions, but to inspire judges to develop a common way of thinking when it comes to ethics.⁸ In September 2014, the European Network of Councils for the Judiciary (hereinafter: "ENCJ") established a project team to adopt minimum standards in connection with disciplinary proceedings. After a continent-wide research, a report named Minimum Judicial Standards V was published. The report emphasizes that a code of ethics applicable for judges should be created at a national level, and to ensure its enforcement, the member states should establish a separate body for receiving complaints.⁹

2. The development of the Hungarian Code of Ethics for Judges

2.1. The importance of the Code of Ethics for judges

In the light of the above theoretical approach, we can state that having an official written code of ethics is of great importance. It is beyond disputes that the judicial office requires judges to suit stricter ethical rules than probably any other member of the society. This strict point of view is closely linked to the role of the judiciary in a society. In the light of this role, it is essential for the judiciary to have its own code of ethics. It is the only way to foster the development of common sense of ethics among judges. Furthermore, having written principles communicates a good message for the society as well which is essential with regards to the prestige of the judiciary and, after all, to the acceptance of judgments.

⁸ KONDOROSI Ferenc – UTTÓ György – VISEGRÁDY Antal: A bírói etika és a tisztességes eljárás. Magyar Hivatalos Közlönykiadó, Budapest, 2007., p. 51

⁹ ENCJ – Minimum Judicial Standards V – Disciplinary proceedings and liability of judges, p. 24

The Minimum Judicial Standards V confirms the above as it specifies that codes should be created at a national and not a European level and they should contain a list or description of judicial misconducts which would be unacceptable in any particular country. At this point, we can see that according to the common standards, the most important development is to set the ethical rules in a written code.¹⁰

In addition, a code of judicial ethics has a special importance and several functions in modern societies. It can help judges solve ethical problems, it gives them autonomy in decision making and guarantees their independence.¹¹ It can also mean safety for judges if we take into consideration that without a written code, judges might be treated unequally in the course of disciplinary proceedings.

Later in our study we will present the importance of a written code with regard to the proceeding of the Disciplinary Court.

2.2. The impact of international agreements

The question of ethical norms and their incorporation into a code has been a hot topic all over the world in the previous decades. When Hungary decided to collect and embody ethics related norms in a code of ethics plenty of international experiences were available.

In connection with the core values of modern democratic societies, there is a need to discuss the impact of international documents. If we would like to mention the most important treaties, than those would be certainly the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Right* and the *European Convention of Human Rights* (hereinafter: “ECHR”).

Article 6 of ECHR declares the right to a fair trial. „*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*”

Regarding the criminal procedure, Article 6 declares the presumption of innocence and guarantees certain minimum rights for everyone charged with a criminal offense.¹²

¹⁰ ENCJ – Minimum Judicial Standards V – Disciplinary proceedings and liability of judges, p. 39

¹¹ Greg MAYNE: Judicial integrity p. 47

http://birosag.hu/sites/default/files/allomanyok/kozadatok/obh/7._sz._melleklet_-_gcr_chapter_3_final.pdf

¹² European Convention of Human Rights Article 6 p.9:

http://www.echr.coe.int/Documents/Convention_ENG.pdf

Hungary ratified the Convention on 5 November 1992. Since then, everyone who feels the Hungarian authorities violated their rights ensured in the Declaration or its protocols, after all remedies, is entitled for the legal protection of the European Court of Human Rights.¹³

The Universal Declaration of Human Rights stipulates the right to a fair and public hearing by an independent and impartial tribunal. It contains the same requirements regarding impartiality and independence.¹⁴ The International Covenant on Civil and Political Rights declares the principle of equality before the courts, right to a competent, independent and impartial tribunal.¹⁵

The requirements to have an independent and impartial judiciary seem to be a simple task at first glance, but the details are far more complex. With ratifying international agreements, Hungary committed itself to comply with them and fulfill their requirements. This process had a direct influence on Hungary and enhanced the incorporation of the ethics related norms.

It is important to emphasize that the above requirements manifested in the international agreements are judicial ethical values and, as so, are also declared in codes of ethics for judges.

2.3. The integration of the Bangalore Principles into the Hungarian Code of Ethics

If it comes to international standards and their influence, we need to devote a separate chapter for the Bangalore Principles.

A Judicial Group on Strengthening Judicial Integrity, linked to the United Nations, developed the Bangalore Principles. The Bangalore Draft was widely disseminated among judges of both common law and civil law systems worldwide, and discussed at several judicial forums. The document became a cornerstone among the countries, and it is not an exaggeration to state that, its principles are required to be followed in modern democracies. It lays down standards which guarantee human rights, the independence and integrity of the judiciary. The Bangalore Principles of Judicial Conduct endeavor to enhance public confidence in the judiciary.¹⁶ The document defines ethical values. Each value contains a principle and an application. The

¹³ VISEGRÁDY Antal – KONDOROSI Ferenc – UTTÓ György: *Bírói etika és tisztességes eljárás*, Magyar Hivatalos Közlönykiadó, Budapest, 2007, p. 78

¹⁴ The Bangalore Principles of Judicial Conduct:
http://birosag.hu/sites/default/files/allomanyok/kozadatok/obh/2._sz._melleklet_-_bangalore_principles_0.pdf

¹⁵ The Bangalore Principles of Judicial Conduct:
http://birosag.hu/sites/default/files/allomanyok/kozadatok/obh/2._sz._melleklet_-_bangalore_principles_0.pdf

¹⁶ The Bangalore Principles of Judicial Conduct:
http://birosag.hu/sites/default/files/allomanyok/kozadatok/obh/2._sz._melleklet__bangalore_principles_0.pdf

Bangalore Principles considers independence, impartiality, integrity, propriety, equality, competence and diligence as values of the judiciary. There are several points where we can encounter the direct influence of these principles in the Hungarian Code of Ethics.

2.4. A brief history of the Hungarian Code of Ethics

After presenting the international impacts, we would like to briefly summarize the history of the Hungarian regulation in order to present the road from the initial common demand of having ethics related regulations to the embodied Code of Ethics.

The organization behind the idea of developing a code of ethics for judges was the Association of Hungarian Judges (hereinafter: “Association”). From its establishment, the Association took it seriously to develop methods to ensure judicial independence. The recognition of the role of ethics in granting independence came at first glance right after the establishment. As judicial activity has a direct influence on the life of people, its quality and efficiency is the interest of the state. Only an integrated and healthy judicial organization can fulfill this role in a society with core values incorporated in a code of ethics. The Association realized that common sense of ethics is essential for the judiciary as an organization and the way to ensure this is to collect and incorporate the rules into a code of ethics.

Ethics related norms – such as independence and impartiality – have been declared in written law for a long time, but only on a general level. When the act on the legal status and remuneration of judges¹⁷ came into force in 1997, the National Council of Justice wanted to have a more detailed regulation, but the level on which these new ethics related regulations shall come into force was far not obvious. In order to understand the international practice, Hungary asked the Council of Europe to provide information related to the national regulations all over the member states. Based on domestic and international experiences, the National Council of Justice decided not to stipulate the detailed ethical norms on a statutory level, but rather on a non-compulsory one.

The National Council of Justice wanted to create a Code of Ethics which reflects the will of the majority of judges, so it provided the opportunity for all judges to form their opinion. The major demands coming from the community of judges can be summarized as following: the Code should be short and consistent and should avoid unnecessary explanations; there should be a

¹⁷ Act CLXII of 2007 on the legal status and remuneration of judges

part settling down the state's duties in granting the tools for the judges in order to enable them to respect the code; need for a body dealing with ethical misdemeanors.

After gathering all the necessary information, the Association created the Code which was published as a guideline and not as a mandatory collection of regulations. The community of judges wanted to establish a body dealing with problems stemming from the interpretation of the Code. This is how the Hungarian Judicial Board of Ethics was set up, which body's proceeding was anonym and it dealt rather with interpretation problems and not with the imposition of sanctions in concrete cases. The result of a procedure was the disclosure of the decision, with the intent of raising awareness. Observing the practice of other EU member states, we can see that Austria is handling this question on a similar way.¹⁸

The main advantage of this development was that the Code helped to secure the basic ethical principles of the judiciary and it clearly stipulated the rules of behaviors and provided a preliminary warning. On the other hand, there are some clear disadvantages as well. The Hungarian Judicial Board of Ethics could discuss any interesting or media-focused situation related to Hungarian judges without any respect whether the judge is member of the Association or not. The Hungarian Judicial Board of Ethics used to discuss the case always in camera meetings, thus the judge concerned in the case had no chance to give voice to his or her opinion. The decisions were published on the official website of the Association – so they are publicly available – and however the decisions were published anonymously, finally all members of the Hungarian judiciary knew who was personally concerned in a certain decision – as we mentioned without any right of hearing and appeal.

In the year 2012, the time has come to reform the regulations. The initiation came from the President of the National Office for the Judiciary who handled this issue with high priority and entitled the National Judicial Council to create the new Code of Ethics. Furthermore, a statutory amendment, coming into force in the meantime, also delegated the obligation to create a new code of ethics to the National Judicial Council.¹⁹ As we can see, the entitlement to create a new code of ethics came from the legislative this time, and it was not the initiation of the judges' self-assembly, the Association. For this purpose, the National Judicial Council established the Ethics Coordination Commission which body started immediately with providing the judges an opportunity to express their thoughts related to the draft of the new Code of Ethics. If we would

¹⁸ http://birosag.hu/sites/default/files/allomanyok/kozadatok/obh/osszefoglalo_etika_0312.pdf

¹⁹ GERBER Tamás: A bírák etikai kódexének megalkotásához vezető út:
[http://www.jogiforum.hu/files/publikaciok/gerber_tamas__a_birak_etikai_kodexenek_megalkotashoz_vezeto_ut\[jogi_forum\].pdf](http://www.jogiforum.hu/files/publikaciok/gerber_tamas__a_birak_etikai_kodexenek_megalkotashoz_vezeto_ut[jogi_forum].pdf)

like to pick one important question which rose in the course of the creation process, it would be certainly the question of the new Code of Ethics' scope. Should it be applicable for judges only or should the secretaries and assessors be bound by its norms as well? In spite of the fact that both secretary judges and lay assessors bear important roles inside the judicial system, their legal relationship to the organization is governed by different acts, so their ethical liability should be different as well.

After a long coordination process the new Code of Ethics was born, and the next question was to determine its legal nature by stipulating the norms governing its enforcement. The amendment of the act on the legal status and remuneration of judges coming into force in the meantime provided answer for this question: according to Section 105 Subsection b), the judges commit a disciplinary offense when they culpably breach or threaten the prestige of the judicial profession by a way of life or any attitude. These offenses and their sanctions shall be judged by the Disciplinary Court.

3. The features of the Hungarian Code of Ethics for Judges

3.1. Introduction

After presenting its development and the circumstances under which it came into force, we would like to summarize the content of the Hungarian Code of Ethics.

The Hungarian Code of Ethics for Judges consists of seven articles, each of which contains a certain value. The preamble of the Code refers to the independence, the integrity and the transparency of judiciary which are widely recognized as preconditions of democracy.

In accordance with the Fundamental Law of Hungary²⁰, judicial power is exercised by independent and impartial judges, and fulfills its constitutional role through a transparent judicial system.

The Hungarian Code contains the following values: independence, legal conflict of interests, dignity, diligence, respect and cooperation, honesty and provisions regarding senior judges. In the following, we summarize the core values incorporated in the Hungarian Code of Ethics, highlighting the most prominent ones.

²⁰ The Fundamental Law of Hungary is the Hungarian constitution.

3.2. Independence and impartiality

Judicial independence is one of the most important prerequisites of the rule of law. It plays a key role in preventing tyranny and in guaranteeing human rights. It is not only a principle of jurisdiction but also the essence of judicial activity: the court is no court without independence.²¹ As a paramount democratic principle, independence is declared by all of the abovementioned international agreements and is the first core value of the Bangalore Principles, too. In accordance with its importance, the Hungarian Code of Ethics also defines judicial independence in its Article 1, at the very beginning.

What is judicial independence? It has two components: personal independence of the judge and structural independence of the judicial system.

Personal independence is the most important guarantee of the judicial system. It suggests that “judges shall be independent and subordinated to acts only. They shall not be instructed in relation to their judicial activities.”²² Personal independence can be interpreted horizontally and vertically, both aspects are embodied in the Code. Regarding the horizontal interpretation, the judge shall be free of any influence coming from same-level colleagues and also from outside the judicial system. Considering the vertical independence, the judge shall be free of inferior and superior courts and judges, too.²³

Article 1 of the Code lays down that judges shall be free of any influence. Inner independence means that the judge shall be free of his or her preconceived mental attitude (bias, prejudice). The Code also prescribes that the judge shall always validate the principle of equal treatment of the parties and respect human dignity of every people.²⁴ Thus, the Code handles independence and impartiality as two aspects of the same value.

As for *structural independence*, our starting point is the separation of powers described at the very beginning. According to this principle, all branches of power shall be independent and have its own organizations. No element of the function of jurisdiction can be subject to the control of other branches. Contrarily, the courts may examine the resolutions of organizations of other branches (primarily the executive), e.g. in the framework of administrative jurisdiction. This wide control over other powers is itself a guarantee of the separation of powers.²⁵

²¹ KUKORELLI István (szerk.): Alkotmánytan I., Osiris, Budapest, 2007, p. 528

²² Article 26 (1) of the Fundamental Law of Hungary

²³ Lecture of VISEGRÁDY Antal at the University of Pécs, 2011

²⁴ Hungarian Code of Ethics for Judges:

http://birosag.hu/sites/default/files/allomanyok/birosagi_hirek/etikai_kodex.pdf

²⁵ KUKORELLI István (szerk.): Alkotmánytan I., Osiris, Budapest, 2007, p. 531

It is important to emphasize that independence cannot be interpreted without impartiality. The two values are related closely and examined together. In the course of understanding the essence of independence and impartiality, we have to take into account the case law of the European Court of Human Rights in Strasbourg.

The Court monitors impartiality from subjective and objective points of view and takes into consideration the personal attitude of the judge, too.²⁶ In its practice, the Court developed the subjective and objective tests of examining impartiality. According to the *subjective* test, the Court monitors whether the judge held any personal prejudice or bias in the case. In the *objective* test, the Court ascertains whether the tribunal itself and its composition offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.²⁷

For a better understanding of the Court's interpretation of independence and impartiality, it is necessary to present some important cases.

According to the decision of the Court delivered in the *Wettstein v Switzerland* case, it is prohibited for judges, even if they are part time employees, to practice as lawyers in order to ensure their impartiality.²⁸

In the *Kyprianou v Cyprus* case, the Court declared that the court, having been personally offended by the applicant with the disturbance of the order of trial which reaches the level of a criminal offense, cannot be considered as impartial. As so, about the legal consequences of the offense, another court or the prosecutor office shall decide.²⁹

Based on the findings in the *Puolitaival and Pirttiaho v Finland* case on impartiality, it is no violation of Article 6 of ECHR if the judge, in a prior case, was the counsel of the applicant's opponent party. According to the Court, this gave no reasonable grounds for fearing that the judge might have a preconceived attitude against the applicants' company.³⁰

3.3. Legal conflict of interests

Besides being independent in the course of practicing their judicial power, judges must maintain the appearance of being independent as well. In order to enable judges to remain impartial and independent, the Code stipulates various sets of regulations respecting judges' behavior outside

²⁶ VISEGRÁDY Antal – KONDOROSI Ferenc – UTTÓ György: A bírói etika és a tisztességes eljárás. Magyar Hivatalos Közlönykiadó, Budapest, 2007., p.91

²⁷ Inter alia, ECHR, Fey v Austria, 24.2. 1993

²⁸ ECHR, Wettstein v Switzerland, 21. 12. 2000

²⁹ ECHR, Kyprianou v Cyprus, 27. 1. 2004

³⁰ ECHR, Puolitaival and Pirttiaho v Finland, 23. 11. 2004

the office. Probably the most important prohibition is to abstain from any political activity. In order to guarantee independence from any political impact, judges shall not be members of any company or NGO that can be related to a political party.

In addition to the above, the code contains further guidelines for judges in order to enable them to remain independent under all circumstances. It is essential that judges shall not criticize the judiciary and the work of other colleagues. At this point, we can see what it means in practice for judges to accept extraordinary rules in their private lives.³¹ We can say that the conflict of interests in a certain sense is also a guarantee of judicial independence.

3.4. Preservation of dignity and maintenance of prestige

The preservation of dignity and the maintenance of the prestige of the judiciary and the judicial office are substantial in a society. Unless the fulfillment of the requirements mentioned previously, the society might not respect the judiciary and may not follow its ordinances.

The cornerstone of this set of regulations is that judges shall follow the legal rules and avoid any kind of connection with organizations aiming to breach the law. It would be hard to expect from the society to respect the judgment delivered by a judge who violates the law as well. The Code stipulates further guidelines respecting judges' appearance and behavior in both their professional and private lives.³² In this respect, it is important to abstain from extreme outfits and public disputes. According to the Code, judges shall use the internet with due care. It is not forbidden to have profiles on various social networks, but to refrain from sharing inappropriate contents and comments is a must. Furthermore, senior judges are obliged to monitor other colleagues' behavior in order to ensure their compliance with the Code.

3.5. Respect of human dignity

Based on domestic and international laws, everyone is entitled to be treated appropriately in the course of a court trial. In practice, it means that clients must be handled with dignity, and judges shall refrain from communicating unnecessary degrading opinions. Every people are entitled to be treated as human beings, they are always subjects and never objects of the proceedings. In

³¹ Hungarian Code of Ethics for Judges:

http://birosag.hu/sites/default/files/allomanyok/birosagi_hirek/etikai_kodex.pdf

³² Hungarian Code of Ethics for Judges:

http://birosag.hu/sites/default/files/allomanyok/birosagi_hirek/etikai_kodex.pdf

the course of their judicial activity, judges shall be patient and polite with all parties and they shall ensure the validation of this with respect to the relation of the parties to each other. In order to keep up the independence and its appearance, it is vital to treat parties equally and free of discrimination.

3.6. Requirement of reasonable time

The requirement to make a decision within a reasonable period of time is an element of the right to a fair trial which is complex system of minimum requirements that have to be ensured at all levels of the judiciary in order to protect individuals from unlawful treatment during procedures. The right to a fair trial is recognized as a fundamental right.

The requirement of reasonable time is stipulated in the Hungarian Civil Procedure Code and in the Hungarian Code of Ethics for Judges as well.

Whether the reasonable timeframe is kept or not, can only be decided on a case-by-case basis. There are numerous factors, which need to be taken into consideration, like complexity of the case and behavior of the parties. In order to realize this requirement, the parties are entitled for compensation if their right to a reasonable period of time is breached.³³

4. Validation of ethical liability

4.1. The connection between the Code and disciplinary liability

The Code of Ethics may help judges to build up an inner moral sense, to separate good from bad, moral from unmoral.³⁴ Obviously, most judges always demean in compliance with the ethical principles manifested in the Code. But for the case when the judge refuses to act ethically, consequences have to be defined. However, ethical norms in the strict sense can never have legal sanctions. They only have social consequences, thus, in order to make legal sanctions applicable, ethical norms must be transformed into legal rules. It happens by way of the legislative declaring ethical misconducts as disciplinary offenses.

³³ VISEGRÁDY Antal – KONDOROSI Ferenc – UTTÓ György: A bírói etika és a tisztességes eljárás, Magyar Hivatalos Közlönykiadó, Budapest, 2007., p. 92

³⁴ HANDÓ Tünde: A jogállamiság megújuló fundamentuma, a bírói integritás. In: Jogi beszélgetések, Kaposvár, 2013-2015, p. 123

Despite the basically different principles of ethical and disciplinary regulations, the two institutions are hard to be distinguished. A conduct of exceptionable morals may reach a certain level which can lead to disciplinary consequences.³⁵

Accordingly, in Hungary, certain ethical offenses are declared disciplinary offenses and as so, prohibited by the law. The disciplinary misconduct is regulated and defined by the act on the legal status and remuneration of judges and it has two types. It can either be (a) a culpable breach of an obligation arising from the status of judges or (b) a breach or threat of the prestige of judicial profession by a way of life or any attitude. As we can see, the legislative intended to protect the prestige of judicial profession by way of this rule. The prestige or social acceptance of the judiciary is based on the faith and trust in the impartiality, independence and integrity of judges.³⁶ Thus, the standards “(a)” and “(b)” are serving the fundamental principles of the judicial system.

While the above rule “(a)” refers to a classic professional disciplinary offense in any employment relationship, rule “(b)” is the one that connects disciplinary (i.e. legal) and ethical regulations. Its scope covers the private life of judges, too and it links disciplinary consequences to ethical offenses. As we can see, the law, by way of rather general wording, prohibits basically any unethical conducts for judges, be it professional or of private life. Namely, it is a legitimate expectation that judges should demean in accordance with ethical rules in the field of their private life, too.³⁷

It is the task of the below characterized Disciplinary Court to assess conducts of judges whether they are ethical or not. Since rule “(b)” is this general, the disciplinary court needs a guideline that can help the assessment. It is the Code of Ethics that helps the Disciplinary Court to interpret rule “(b)”, and fill it with content.

Since the Code of Ethics primarily aims to help judges to build up an inner morals sense, as mentioned above, the enforcement of the Code can only be rather indirect. The Code is no law, but it serves as a guideline for the interpretation of law, thus the disciplinary court does not decide upon the Code but the Code helps the Disciplinary Court judge the ethicality of certain conducts. As so, in Hungary, the connection between the Code of Ethics and disciplinary

³⁵ SOLT Pál: Jog, erkölcs, etika: Magyarország, 2006. In: Jogi beszélgetések, Kaposvár, 2004-2006 (2007), p. 102-107

³⁶ SOLT Pál: Jog, erkölcs, etika: Magyarország, 2006. In: Jogi beszélgetések, Kaposvár, 2004-2006 (2007), p. 102-107

³⁷ SOLT Pál: Jog, erkölcs, etika: Magyarország, 2006. In: Jogi beszélgetések, Kaposvár, 2004-2006 (2007), p. 102-107

liability is not as direct as e.g. in Poland where the breach of the principles described in the code of ethics itself is a disciplinary offense which leads to disciplinary responsibility.³⁸

4.2. A brief history of judicial ethical forums

The question arises as to what can be or what should be done if the conduct of judges is against the above detailed ethical-legal regulations. In such cases, the rules are enforceable by certain forums of judicial ethics.

As for a short review of the Hungarian judicial system, there are 111 district courts and 20 administrative and labor courts under 20 regional courts. Above them, there are 5 courts of appeal and, at the top, the highest judicial forum, the Curia, which was named Supreme Court until 2011.

Until 2011, the system of disciplinary courts in Hungary was rather divided territorially. There were first instance disciplinary courts at all 20 regional courts, all 5 courts of appeal and at the Supreme Court, and a second instance disciplinary court at the Supreme Court. This has resulted in the disciplinary court practice varying by regions. To unify the practice, from 2011, the disciplinary courts were centralized and a two-instance forum was set up for the whole country as detailed below, one First Instance Disciplinary Court and one Second Instance Disciplinary Court. The instances of the Disciplinary Courts can be considered as special panels of ordinary courts. Similar judicial disciplinary forums can be observed in Austria and in the Czech Republic.³⁹

Beside the Disciplinary Court, we have to mention some other Hungarian forums of judicial ethics. To meet the abovementioned public demand for the establishment of a body that decides whether a certain conduct of a judge is in compliance with the former Code of Ethics, in November 2005, the Hungarian Judicial Board of Ethics began operations related to the Association of Hungarian Judges in order to help prevent unethical conducts of judges.⁴⁰

Only judges were entitled to request a proceeding of the Hungarian Judicial Board of Ethics. A five-member council examined the conduct and decided whether that is ethical or not, whether the conduct is in compliance with the Code or not. It is important to emphasize that this process was not conducted against judges but on the basis of a certain conduct. No penalty was imposed,

³⁸ ENCJ – Minimum Judicial Standards V – Disciplinary proceedings and liability of judges, p. 63

³⁹ ENCJ – Minimum Judicial Standards V – Disciplinary proceedings and liability of judges, p. 134, 137

⁴⁰ VISEGRÁDY Antal – KONDOROSI Ferenc – UTTÓ György: A bírói etika és a tisztességes eljárás, Magyar Hivatalos Közlönykiadó, Budapest, 2007, p. 69

the aim of the process was to take a stand about the conduct for the future, to create certain standards of judicial conducts. The Hungarian Judicial Board of Ethics worked until 2012.

As for present day, similar requests can be filed with the National Judicial Council to define whether a certain conduct of a judge is ethical or not. The aim of these proceedings is the provisional assessment of a conduct. They are not conducted in order for individual ethical liability to be verified and for disciplinary penalties to be imposed. For that purpose, there is another forum: the centralized Disciplinary Court.

4.3. The Disciplinary Court

The centralized Disciplinary Court was set up in 2011 and it conducts not only disciplinary cases of judges, but also cases arising from professional assessment of the judge and cases arising from conflicts of interests.

Ethical liability of judges belongs to the disciplinary responsibility and can be validated in the framework of disciplinary proceedings. Thus, in Hungary, the platform of validation of ethical liability against judges is the Disciplinary Court.

The Disciplinary Court operates in the country's capital Budapest with a country-wide competence. It is a two-instance judicial forum, against the first instance resolution an appeal can be submitted to the Second Instance Disciplinary Court. The first instance forum operates linked to the Court of Appeal of Budapest, the Second Instance Disciplinary Court is linked to the Curia. The presidents and members of the two instances are appointed by the National Judicial Council. The disciplinary court membership lasts for six years. The members of the Disciplinary Court perform their tasks beside their jurisdictional or administrative tasks.

The procedural order of the Disciplinary Court is approved by the National Judicial Council and contains e.g. the composition of the chambers and the rules of assignment of cases.

4.4. The disciplinary proceedings

In most European Countries there are exact deadlines for initiating disciplinary proceedings against judges. It is mostly 2, 3 or 5 years from the day of the violation. In some countries there is also a shorter deadline to be calculated from becoming aware of the offense. However, there

are countries, like France or Germany, where there are no time limits for initiating disciplinary proceedings at all.⁴¹

As for Hungary, upon a disciplinary offense, disciplinary proceedings can be initiated against the judge by the president of the given court within a three-month deadline from learning about offense, but no later than 3 years from the commitment of the offense. In a certain case, the initiation of the disciplinary procedure is compulsory: if a criminal procedure is instituted against the judge, the disciplinary procedure also has to be initiated, however, it has to be suspended until a final, non-appealable decision is made in the criminal procedure. If the disciplinary offense is milder, no disciplinary procedure has to be initiated: a warning can be applied against the judge.

However it is not obligatory, in most cases, after the initiation of the proceedings, an investigator is assigned to prepare the procedure and to conduct the preliminary investigation. The investigator, that is also a judge of the Disciplinary Court, clarifies the facts and makes a report. After submitting the report, the Disciplinary Court decides on the institution of the disciplinary procedure. The Disciplinary Court proceeds in three-member chambers. Strict exclusion rules apply for judges. The court hearing, where bringing evidence to court is possible, ensures that the procedure is contradictory.

As the survey of ENCJ has shown, in more than half of the European countries, disciplinary proceedings against judges are closed for the public.⁴² Also in Hungary, neither the preliminary investigation nor the whole disciplinary procedure is public. In this regard, disciplinary procedure differ from ordinary trials. The prosecuted judge has the right of defense in any period of the procedure.

According to the result of the procedure, the Disciplinary Court may decide as follows. It can exempt the judge from prosecution, find the judge culpable and impose a penalty or dismiss the case. The possible penalties are very similar in most European countries. They vary from reprimand (for light offenses) to dismissal from office (for severe offenses).⁴³ In Hungary, reprimand, reprehension, reduce in remuneration by one or two levels, dismissal from managing position and initiation of dismissal from judicial office can be applied. The penalty must be proportionate to the disciplinary offense.

⁴¹ ENCJ – Minimum Judicial Standards V – Disciplinary proceedings and liability of judges, p. 110-133

⁴² ENCJ – Minimum Judicial Standards V – Disciplinary proceedings and liability of judges, p. 146-159

⁴³ ENCJ – Minimum Judicial Standards V – Disciplinary proceedings and liability of judges, p. 160-166

As ordinary remedy, an appeal can be filed against the first instance resolution with the Second Instance Disciplinary Court which may uphold or amend the first instance resolution, dismiss the case or repeal the first instance resolution and order a new procedure. According to the final decision, the judge is under the effect of the penalty for a definite time. There is, however, a possibility to release from the effects.

As extraordinary remedy, within 3 years from the final decision, a new procedure can be initiated with regard to new evidences.

5. Summary

The maintenance of democracy demands an independent judiciary. Therefore, it is vital to develop guarantees of independence in all possible fields. It is important to emphasize that only a judiciary with strong ethical values might be able to preserve its independence.

Judiciary as an organization always lied on some sort of common ethical values. However most of these values are clear for judges, there is a need to stipulate them in a written code for several reasons. From this point, a code of ethics helps judges to develop a common sense for ethics. For example, the fact that the Hungarian Code is the outcome of a long cooperation process, and it is reflecting the will of the majority of judges, fosters its validity.

The preservation of independence through the enforcement of the code of ethics is essential. Enforcement mechanisms and sanctions can be guarantees of the validation of the rules stipulated in the code. In Hungary, the setting up of the Disciplinary Court communicates the message not only to judges but to the whole society that the violation of the Code has consequences.

Regarding judges as individuals, they fulfill an important role in the society with an immense responsibility. Their beautiful task is to respect human dignity under all circumstances. Thus, judicial ethics are always there as a lantern to enlighten what is morally good in dark and hard situations.

Talking about the trust of the society in the judiciary, we return to our starting point, to the separation of powers. Judiciary, which plays essential role in preventing the branches to exercise each other's core functions, must be completely independent and must bear the trust of the society. Without strong ethical values, it would be hard to earn the respect of the citizens. Thus, ensuring ethics within the judiciary is vital in a democracy.

6. Judicial ethics in the practice – a fictional case

Judge Smith starts working at a district court on 1 June 2014. Shortly after his arrival, on 20 June, Judge Wilson, president of the court checks if Judge Smith met the procedural deadlines in all of his cases. During this, he perceives that judge Smith, in one of his cases, ordered for a witness to give a testimony by way of a videoconference as the witness was living abroad. Judge Wilson goes to judge Smith's office to tell him his opinion about using telecommunication in the courtroom, that it is much more difficult for the judge to assess whether the witness is telling the truth if the witness is not present. Thus, he wants Smith not to inform the parties about this resolution, but warrant the witness to appear at the hearing. Judge Smith tells Wilson that his decision is final. Wilson says Smith: "Do what I say!" and leaves the room. Judge Smith turns to the president of the superior regional court after the incident.

The president of the regional court initiates a disciplinary procedure against Judge Wilson on 10 July.

To be continued in Omšenie...