

Mutual relations of the lawyer and the judge

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One cannot talk about mutual relations of the lawyer and the judge in Armenia in the 21st century without recalling the code of laws by Mkhitar Gosh from the late 12th century. In the fifth title of the Introduction to this important medieval legal artefact, the author reminds that *“to make error-free decisions, the judge must be experienced, of good education, knowledgeable of the Holy Scriptures as well as of the earthly life. The judge must be of age, contemplative and intellectually mature so as to avoid mistakes due to ignorance. Because, as not anyone can practice even a less important profession without due preparation, the more such preparation is important in the great mission of a judge, dignified of God. Making justice is a work of God, for God is the true judge; others are then called judges like Him. Therefore, the judge is to be educated, measured, wise and impartial in all relations so as not to distort godly justice and not to serve its dispraise”*.

I would say that there is nothing to add to this definition of the judge even nowadays.

The role of the lawyer is also necessary and noble.

“A lawyer capable of averting a judgment of death is worthy of love and respect,” Shamir Shamirian said in late 18th century in Article 206 of the draft Constitution of an independent Armenia.

What should therefore the relations of the judge and the lawyer should be like?

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A simple answer is that the lawyer is an *amicus curiae*, that is, a friend of the court.

Issues associated with the mutual relation of the lawyer and the judge are legal issues as well as—to a much greater extent—issues from the area of professional ethics.

The relation of the judge to the lawyer should remain independent and impartial.

According to the Report on judicial independence and impartiality in the Council of Europe member States in 2017, “the standards of conduct applying to judges are a precondition for confidence in the administration of justice, and the public confidence in and respect for the judiciary are the guarantees of the effectiveness of the judicial system. Judges should therefore discharge their duties without any favouritism, display of prejudice or bias, and with due respect for the principle of equal treatment of parties. Judges should not reach

their decisions by taking into consideration anything which falls outside the application of the rule of law. Judges should both be mindful of and be able to perform their obligations under Article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms to deliver judgment within a reasonable time. Judges should behave in such a way as to avoid conflicts of interest or abuses of power. Judges should conduct themselves in a respectable way in their private life”.

In the European Union, the relation of the lawyer to the judge is regulated by the Code of Conduct issued by the Council of Bars and Law Societies of Europe (CCBE) in its Part 4.

“A lawyer must always have due regard for the fair conduct of proceedings. He must not, for example, make contact with the judge without first informing the lawyer acting for the opposing party or submit exhibits, notes or documents to the judge without communicating them in good time to the lawyer on the other side unless such steps are permitted under the relevant rules of procedure. To the extent not prohibited by law a lawyer must not divulge or submit to the court any proposals for settlement of the case made by the other party or its lawyer without the express consent by the other party’s lawyer.

A lawyer shall while maintaining due respect and courtesy towards the court defend the interests of his client honourably and fearlessly without regard to his own interests or to any consequences to himself or to any other person.

A lawyer shall never knowingly give false or misleading information to the court.

The rules governing a lawyer’s relations with the courts apply also to his relations with arbitrators and any other persons exercising judicial or quasi-judicial functions, even on an occasional basis.”

In the words of a respected immortalized Czech judge Josef Rubeš, written two years after the fall of communism in Czechoslovakia:

“The person of the judge is determined by provisions on the jurisdiction and schedule of work, the person of the lawyer is a matter of the party’s selection. The judge is paid as an employee of the state apparatus, the lawyer must earn their remuneration. The judge is obliged to instruct both parties, the lawyer is obliged to instruct their client only. The judge selects a procedure leading to the termination of the proceedings, the lawyer advises their client on how to proceed to achieve the aim favourable to the client. The judge must be impartial, the lawyer is partial. The judge decides, the lawyer helps their client to achieve a decision favourable to the client. In spite of these differences, there is no need for hostility between these persons involved in proceedings. On the contrary, there are many reasons for judges and lawyers to have the best possible relations.”

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An ideal model of the relation between the lawyer and the judge is therefore based on mutual respect of personalities with high moral integrity, colleagues within a broader framework of the judiciary, together finding justice from different viewing angles.

There are essentially two variants of behaviour contrary to this model:

(1) the relation of the lawyer and the judge exceeds the boundaries of collegial friendship and turns into a plot, or

(2) hostility occurs between the judge and the lawyer, usually induced by the fact that one of them is not behaving according to the law or ethical rules.

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How far can a friendship of the judge and the lawyer go?

This thorny issue may whip up emotions in the non-legal public in relation to trust in the judiciary on the one side or overly cautious efforts to isolate judges in court buildings on the other side.

I would say that every society goes through both these extremes sooner or later. Personally, I remember that when I asked an Italian judge at a similar conference in 1994 whether it was possible that a lawyer and a judge played tennis together at a weekend, the answer was indeed Italian-like:

“In Milan yes but I would not recommend that in Palermo.”

In Brussels in the Palace of Justice, I saw a poster with an invitation to a common lunch of judges and lawyers.

I have to say that the Czech society has been groping in the dark for quite some time. The denouement came with an acquitting judgment of the judicial disciplinary panel of the Supreme Administrative Court last year. A judge was sued for out-of-court contacts with a lawyer. If you permit, I will quote a part of the reasoning:

“According to the law on courts and judges, the judge and the lay judge are obliged to carry out their offices conscientiously and to refrain, in their civil lives, from anything that could impair the dignity of the judicial office or endanger trust in independent, impartial and fair decision-making of courts. In order to ensure the independence and impartiality of the office of judge, the judge is, in particular, obliged to behave in a way not providing a reason for undermining confidence in the judiciary and the dignity of the office of judge, and to behave in a way that does not provoke reasonable doubts about the judge’s impartiality.

It is clear from the actual text of the aforementioned provisions that the judge is, to a certain extent, restricted in their freedom to act as they wish, to be led by their emotions and to be influenced by relations to other people. The meaning and purpose of that restriction is to achieve a reasonable distance between the judge and the matter they are deciding, and the

fact that the “addressees” of the judge’s decision-making activities will perceive the judge as a prudent and impartial person, able to assess the matter without siding with either party.

On the other hand, it is obvious that despite the aforementioned provisions, a judge remains a man of flesh and blood, with reason but also with emotion, not only a subsumption machine programmed for mechanical, emotionless and inclination-deprived decision-making. The judge just as any other person lives in a certain relational and social environment formed by a web of family, friendly, collegial and other relations. Judges love and hate, cheer and loathe, have normal human prejudices. The environment in which they live as well as their human nature undoubtedly form them in terms of values and influence them, which is reflected in their decision-making activities.

The idea that a judge closes themselves from the outside world in all its diversity and complexity in a kind of seclusion, and thus becomes impartial and independent, is undoubtedly naive. The mere fact that judicial practice is carried out for several years in one professional position and in one place is necessarily associated with the fact that during that time a judge meets, in connection with their job or otherwise, a number of people and establishes more or less close relations, often friendly ones, with them. In the Czech Republic, where there are more than 3,000 judges, approximately 1,200 prosecutors, about 11,000 lawyers and hundreds of notaries and court enforcement officers as generally known in the legal sphere, it is quite common, especially in the context of certain specialized agendas and certain places or regions, that members of the legal community know each other for years and maintain more or less friendly or professionally friendly relations. In some segments of the legal practice it is quite common that the same people meet repeatedly and very often in similar procedural roles. An example can be judges and prosecutors from small courts and the respective—logically also small—prosecution offices. The same applies to judges involved in inheritance matters and “their” notaries or to enforcement judges and some court enforcement officers. Frequent contacts between judges and other legal and non-legal professions in other specialized agendas are also common (for example, in intellectual property law agendas or, typically in small courts, custody judges and employees of an authority of social and legal protection of children often meet). In a number of cases, the relation between the judge and another legal professional is not a relation based mainly on a procedural conflict but, on the contrary, one presuming cooperation and a high degree of formal and informal cooperation lasting for a long time in individual cases. An example of such a relation is that of the insolvency judge and the insolvency administrator but also that of the judge deciding in inheritance agenda and the respective notary or, to a lesser extent, of the enforcement judge and the court enforcement officer.

The fact that professional friendships may be established for the aforementioned but also other reasons (meeting in educational events and conferences, common publishing activities, old acquaintances e.g. as fellow students studying at the few Czech law schools, etc.) clearly cannot be considered in itself a violation of the judge’s duties under the law on courts and judges. On the contrary, under normal circumstances, that is, if a judge has a sufficient level of healthy self-confidence, prudence, restraint and is aware of professional

standards that are to be observed, professional friendships deepen the judges' awareness of how the practice works in their field, and enhance their professional knowledge. Under normal circumstances, if a judge is fair and honest, properly functioning relations of professional friendship and the judge's engagement in the professional community increases, not decreases the authority of the judiciary in the professional community and in society as a whole. A judge recognized by the professional community is not afraid to communicate and discuss, including very openly, profession-related matters in the community, while making clear they do serve to anyone and anything but justice is the best representative of the judiciary.

The relations described above, especially if they are of a long-term nature, often lead to less formal contacts between the actors. Being on first-name terms, friendly chats over a coffee or wine, common lunches or dinners, and sometimes even common activities (culture, sport, etc.) and discussing usual human concerns are not an exception. None of this, in itself, can be considered an objectionable relation. However, such relations become dangerous when they develop into dependency, bias or even hints of utilitarianism. Completely "off-limits" would be cases where a judge receives consideration exceeding the framework of common courtesy, of course taking into account the decent pay that judges have at present. Mutual invitations to a lunch worth hundreds or few thousand Czech crowns, if adequately reciprocated, or other similar common courtesies do certainly not prejudice the judge's independence. However, provision of significant advantages, such as those associated with spending leisure time or other aspects of ordinary life (unjustified discounts, provision of a consideration for free or for a reduced price where other persons are not provided with such advantages, etc.) or even common engagement in activities due to which the judge could get under unpleasant pressure or feel that they could be blackmailed is definitely outside the scope of 'acceptable'.

Professional friendship under normal circumstances is not a reason to doubt the impartiality of a judge. It cannot be required from judges, and the Czech system of judiciary could even be paralysed by this in some segments, that the mere fact that a judge has long known a certain procedural actor (lawyer, prosecutor, insolvency administrator, a person repeatedly representing a party to the proceedings, e.g., a certain authority), sometimes is on first-name terms with that persons, has informal discussions with that person and otherwise meets that person in the framework of the boundaries of professional friendship described above, constituted a reason for the judge's exclusion. Only additional, specific circumstances from which it would have to be concluded that the judge may not be able to maintain a sufficient distance from the respective procedural actor and assess that actor's acts (procedural acts, legal argumentation, generally procedure in the exercise of the person's procedural role, etc.) without bias would constitute such a reason."

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Let's now move to an imaginary courtroom.

“Never patronize the lawyer, be decisive and strict, but mainly courteous and polite: do not talk down to the lawyer, especially not in front of their client, be human and understanding in relation to your colleague—he or she too can have difficulties occasionally; you will not gain anything by administering fines for obstructing court proceedings; be timely and punctual; it is not your business how much a lawyer earns—wish them their earnings, they are not easy... If proceedings do not end in a decision, it is largely your fault—you are the master of the process, not the lawyer, do not be afraid to praise the lawyer for good performance and a constructive approach to the proceedings; in providing reasoning for the decision, tell the lawyer clearly your opinion on the matter; write decisions the lawyer will understand; mind that you have a common destiny: to find justice,” authors of the *Key to the courtroom* guide wisely advise to novice judges.

Punishment of lawyers and judges who violate their obligations differs in European countries.

In the Czech Republic, anyone who grossly obstructs the proceedings mainly by failing to appear before the court without good reason or disobeying a court order, or who disturbs the order or who has made a grossly offensive deposition or failed to fulfil imposed obligations may be imposed, through a resolution of the chairing judge, a fine for obstructing court proceedings of up to 50,000 CZK, i.e., approx. 2,000 EUR. The chairing judge may later waive the imposed fine, including after termination of the proceedings, if justified by subsequent conduct of the person who had been fined. A fine may be imposed on a party as well on a lawyer. The fine may not be imposed in other cases than those stipulated in procedural regulations.

The judge may notify any inappropriate behaviour of law, not only with respect to the court but also to the other party, to the bar association that has disciplinary authority. Disciplinary proceedings are two-instance proceedings before the disciplinary commission of the bar association and before the appellate disciplinary commission of the bar association. A lawyer may file an action against the second-instance disciplinary decision, which will be considered by an administrative court. A cassation complaint may be filed with the Supreme Administrative Court against a decision of a regional court, and a constitutional complaint may be filed with the Constitutional Court.

In the case of one and same act, the *non bis in idem* principle applies.

In their negotiations with judges of the Supreme Administrative Court, members of the bar association delegation were persuading *“the judges that in disciplinary punishing, the relation between the lawyer and the client is a unique and specific relation, completely different from those established in the performance of other legal professions where disciplinary liability also applies, whether that includes judges, prosecutors, notaries or law enforcement officers. The relation of trust only exists between the lawyer and the client, not in the exercise of any other profession; the lawyer is a kind of a confessor to their client, and a betrayal of the client is a “capital offence”. This premise or rather a notoriety predestines the basic view of most of lawyers’ transgressions, and it need not be proven in assessing the*

lawyer's actions after filing of a disciplinary action,” a report for the last year’s Assembly of the Czech Bar Association says.

Cases of disciplinary proceedings against a lawyer for violations of duties with respect to the court and the judges are scarce; there are no available statistics of fines for obstructing court proceedings but for myself I can say I have never been fined. Therefore, the threat of sanctions has rather a preventive nature.

The lawyer can complain about inappropriate behaviour of the judge with one of disciplinary plaintiffs against judges, the president of the respective court, the president of a higher-instance court or the Minister of Justice. Disciplinary proceedings with a judge are one-instance proceedings, conducted by the disciplinary panel of the Supreme Administrative Court, consisting of professional judges and disciplinary judges recruited from other legal professions and university teachers from law schools. This part of the disciplinary agenda is not very frequent in the Czech Republic either.

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What to say in conclusion?

The mutual relation of the lawyer and the judge everywhere depends on the fact whether they both are really independent.

For a judge who is not independent but serves an undemocratic regime, a lawyer who protects human and fundamental rights and freedoms of their client is an enemy.

In a country with developed legal culture and the rule of law, the relation of the judge and the lawyer is based on collegial cooperation and mutual respect.

There are several models of legal regulation, especially regulation of disciplinary proceedings. However, what is essential is the will to abide by the rules. It should be noted that the system as a whole cannot be criticized due to any potential black sheep. Even black sheep deserve having disciplinary proceedings or procedural sanctions against them conducted in accordance with their right to a fair trial.