THEMIS COMPETITION 2015

Judicial Ethics and professional conduct

Semi - Final D

THE MOST RELEVANT PRINCIPLES OF JUDICIAL ETHICS AND PROFESSIONAL CONDUCT. ISSUES RELATED TO THEIR APPLICATION IN LITHUANIA

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INTRODUCTION. REGULATION OF JUDICIAL ETHICS AND PROFESSIONAL CONDUCT IN LITHUANIA

The Code of Ethics of Judges of the Republic of Lithuania[1] (hereinafter referred to as the Code) determines the basic principles of conduct of judges of the Republic of Lithuania. The objective of the Code is to determine the principles of activities and conduct, which are to be followed by a judge during the fulfilment of duties which are laid down by the law and during the time remaining from the exercise of direct duties; to state that justice and other universal human values take priority in judicial activities; to enhance the trust that the public has in courts and judges, and to increase their authority.

Article 5 of the Code provides the basic principles of conduct of judges, viz. (1) respect for the human person; (2) respect and loyalty for the State; (3) justice and impartiality; (4) independence; (5) confidentiality; (6) transparency and publicity; (7) honesty and selflessness; (8) decency; (9) exemplarity; (10) dutifulness; (11) solidarity; (12) improvement of qualification.

The Judicial Ethics and Discipline Commission[2] (hereinafter referred to as the Commission) deals with issues of following the principles of judicial conduct in Lithuania. The Commission is an institution of autonomy of courts, which consults judges on issues of ethics and decides on issues of instituting disciplinary actions against judges. The Commission is composed of seven members. A disciplinary action may be brought against a judge:

(1) for an action demeaning the judicial office, i.e. an action that is incompatible with the judge's honour and is non-compliant with the requirements of the Code, and that demeans the judicial office and undermines the judicial authority. Any misconduct, i.e. gross negligence in performing any specific duty of a judge or the failure to perform such duty without valid excuse, shall also be considered an action demeaning the judicial office;

(2) for violation of other requirements of the Code;

(3) for non-compliance with the limitations on the work and political activities of judges provided by law.

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[1] The Code of Ethics of Judges of the Republic of Lithuania (approved by Resolution No 12P-8 of 28 June 2006 of the general meeting of judges of the Republic of Lithuania). Consulted on 1 May 2015. Available online <http://www.teismai.lt/en/self-governance-of-courts/judicial-ethics-and-discipline-commission/about-comission/667>

[2] The Judicial Ethics and Discipline Commission of the Republic of Lithuania. Consulted on 1 May 2015. Available online <http://www.teismai.lt/en/self-governance-of-courts/judicial-ethics-and-discipline-commission/about-comission/667>

The instituted disciplinary action shall be referred to the Judicial Court of Honour[3]. It is another institution dealing with issues of disciplinary liability of judges and compliance of judicial conduct with the Code. The Judicial Court of Honour is an institution of autonomy of courts hearing disciplinary cases of judges and petitions of judges against defamation. After review of a disciplinary action the Judicial Court of Honour may, by its judgement: (1) dismiss a disciplinary action because of the absence of grounds for disciplinary liability; (2) dismiss a disciplinary action because of lapse of time; (3) limit itself to the review of a disciplinary action; (4) impose a disciplinary sanction. The Judicial Court of Honour may impose one of the following disciplinary sanctions: (1) censure; (2) reprimand; (3) severe reprimand. The Judicial Court of Honour may, by its judgement: (1) suggest to the President of the Republic of Lithuania or the Seimas to dismiss the judge from office; (2) suggest to the President of the Republic of Lithuania to apply to the Seimas to institute impeachment proceedings against the judge. Thus, Lithuania has three key institutions that examine the compliance of judicial conduct with the Code.

The thesis shall analyse the principles of judicial conduct that are currently the most relevant in Lithuania, viz. impartiality and independence, as well as boundaries of the judicial freedom of expression and the relationship of this freedom with other principles of judicial conduct. The decision to analyse these issues has been determined by repeatedly emerging discussions of the Lithuanian society and the community of judges regarding the potential violation of these principles. Moreover, we think that some of these issues might be relevant for other States as well.

1. ISSUES RELATED TO THE APPLICATION OF THE PRINCIPLE OF IMPARTIALITY

Article 8 of the Code establishes the principle of impartiality as well as the principle of justice. In accordance with the principle of justice and impartiality a judge shall observe the following rules:

(1) the language, actions and decisions of a judge shall not be discriminatory to individual persons or groups of the society on gender, sexual preference, age, race, religion or believes, the colour of skin, nationality or ethnic origin, marital status, and a judge shall undertake legal actions to eliminate any detected discrimination;

(2) a judge shall have no personal prejudice while taking decisions and shall not represent preconception on the issues of the pending case;

[3] The Judicial Court of Honour of the Republic of Lithuania. Consulted on 1 May 2015. Available online <http://www.teismai.lt/en/self-governance-of-courts/judicial-court-of-honour/about-court/664>.

(3) a judge shall not demonstrate his/her likes and dislikes and shall not give any exclusive attention to individual persons or groups of persons, or participants of legal proceedings;
(4) while hearing cases a judge cannot submit himself/herself to the influence of government or public authorities, officials, mass media, the public or private individuals;
(5) a judge shall act impartially and search for the most objective and fair decision in conflict situations;
(6) if a judge perceives a conflict of interests or has information that personal circumstances can undermine the hearing of a case, he/she shall withdraw from the case;
(7) a judge shall not consult people on legal issues when the law does not provide for it;
(8) a judge shall avoid speaking in public if this allows to predict the outcome of the pending case, and a judge shall not discuss the pending case with participants of legal proceedings outside the court hearing;
(9) a judge shall not represent in court (except in cases of legal representation) and shall inform the President of the court whether the court where the judge works has a jurisdiction over the case of the judge or the case of the judge's family or extended family members, in which case the President shall decide on referring the case to another court or, if the case is pending in the Supreme Court of Lithuania, the Supreme Administrative Court of Lithuania or the Court of Appeal of Lithuania, shall secure the impartiality;
(10) a judge shall not state his/her personal opinion to the public or mass media regarding the pending specific cases.

Both the case law of Lithuanian courts and the case law of the European Court of Human Rights (hereinafter referred to as the ECHR) understands and interprets impartiality as follows: (1) the court must be subjectively impartial, that is, none of the judges must show bias or personal prejudice, there being a presumption of personal impartiality in the absence of evidence to the contrary. (2) the court must be objectively impartial, which means that it must offer guarantees sufficient to exclude any doubts in this respect. The assessment of objective aspects should include the establishment whether there are any actual facts that, however, raise doubts as to the impartiality of judges. What is at stake is the confidence which the courts in a democratic society must inspire in the public and, first of all, the parties of legal proceedings[4].

There are virtually no situations in Lithuania that would raise doubts as to the judge's impartiality in the subjective aspect; therefore, the thesis shall only analyse the objective aspect of the principle of impartiality. The analysis of disputes of judges with the Commission and their legal assessment, also the analysis of other judicial impartiality-related cases published in the mass media allows to conclude that it is the communication of the judge and other persons outside the court hearing that is the most problematic.

[4] Judgements of the European Court of Human Rights: Daktaras v. Lithuania (No 42095/98) 10 October 2000; Fey v. Austria, 24 February 1993, Series A No 255, § 27, 28 and 30; Wettstein v. Switzerland, No 33958/96, § 42, ECHR 2000-XII.

What are the boundaries of communication of the judge and other participants of legal proceedings (e.g. an attorney) outside the courtroom? How must the judge communicate with other participants of legal proceedings in his/her private life? Does the setting of such communication boundaries violate the inviolability of the judge's private life? These questions are currently triggering discussions in Lithuania and receiving quite a lot of attention from the mass media.

Here are some examples from the Lithuanian case law.

During the hearing of the case in a court of first instance, the plaintiff was not aware that the judge and the defendant were both employed in the same structural subdivision of the University, viz. at the Department of Business Law of the Faculty of Law. However, the judge had to be aware of that. The employment of the said two persons at the same Department with a small number of staff where one person is a lecturer and the other person is the Head of the Department who performs administrative functions in an educational establishment can be treated by a person involved in the case as a circumstance raising doubts as to the judge's impartiality[5].

The plaintiff pointed out the fact that the judge of the judicial panel hearing the case was an associated professor at the Department of the Civil and Commercial Law of the Faculty of Law, while the defendant's representative, the attorney at the time of the hearing of the case at the court of cassation, was an associated professor at the Department of International Law of the same University, and these two Departments were located in front of each other. It seems so that, considering these facts, the plaintiff concluded that the judge and the defendant's representative could know each other, and this raised doubts as to the judge's impartiality during the hearing of the case by cassation. The panel stated that the said alleged partiality of the judge in the investigated case assumed by the plaintiff or, to be more precise, the plaintiff's doubts regarding the potential partiality was based only on an assumption; therefore, it could not deny the presumed principle of the judge's personal impartiality and could not be used as the grounds for concluding that the judge could have been subjectively or objectively partial[6].

The situation where the judge and one of the parties of legal proceedings are employed at the same division of an educational establishment and have subordinate relations raises doubts as to the judge's impartiality; however, in the same situation the fact of employment at the same educational establishment alone and the absence of any other information about the relations of the judge and the party of legal proceedings should not raise doubts as to the judge's impartiality.

[5] The ruling of the Supreme Court of Lithuania in Civil Case No 3K–3–389/2007.
[6] The ruling of the Supreme Court of Lithuania in Civil Case No 3K-3-1/2004.

Another slightly different problem related to the judge's impartiality emerged recently. A judge requested a consultation of whether it was ethical for a judge to hear cases regarding unpaid salaries of other judges even though this judge has himself filed a similar claim, and whether it was ethical for a judge to hear cases regarding unpaid or reduced maternity benefits even though this judge has taken a claim to court regarding the reduction or non-payment of the said benefits? According to the Commission, cases of such nature are related to a potential conflict of interests; however, due consideration must be given to whether the conflict of interests is related to interests of a public or of a private nature. In this case, due consideration must be given to the Bangalore Principles of Judicial Conduct regarding impartiality of judges; Clause 2.5.3 provides that the principle of impartiality would be clearly violated if the judge, or a member of the judge's family, has an economic interest in the outcome of the matter. A paradoxical situation may emerge in Lithuanian courts where no judge would be able to hear the case allocated to him/her if he/she has taken a similar claim to court. According to the Commission, the resulting obstacle for the judge to hear the allocated case in such situation would conflict with the public interest and would be gross injustice.

More discussion should be given to the relations of a judge and other lawyers outside the court hearing. Friendly or close relations of a judge and a prosecutor do not cause any major problems in Lithuania; however, relations between a judge and an attorney make the society seriously doubt impartiality of such judge and cause interest from the mass media, this issue is very thoroughly and publicly analysed, which later may have an impact even on the judge's career. Several examples: "The career of the judge from Marijampolė city is ruined by his close friendship with a hunting attorney", "The judge who has been dismissed from office because of his friendship has declared a war to the President" – these and similar articles keep appearing in the national media. They show that sometimes the reason for the judge's dismissal from office can be his/her close relations with an attorney that demean the judicial office. In other words, the provisions of the Code are violated[7].

To what extent is a judge permitted to communicate with attorneys and other lawyers participating in legal proceedings? When can such communication result in a disciplinary action or even criminal proceedings? Pursuant to Article 8 of the Code, a judge shall not demonstrate his/her likes and dislikes and shall not give any exclusive attention to individual persons or groups of persons, or participants of legal proceedings. If the communication with an attorney will be or could be interpreted as giving to much of attention to an individual participant of legal proceedings, such communication should better be avoided. This does not mean that the judge should completely abstain from any communication with other lawyers.

[7] Murauskienė Dovilė. *Teisėjo bendravimas su advokatu: ribos, turinys ir visuomenės požiūris*. Consulted on 3 May 2015. Available online <http://www.delfi.lt/news/daily/law/teisejo-bendravimas-su-advokatu-ribos-turinys-ir-visuomenes-poziuris.d?id=67356336#ixzz3Xqx59vY9>.

However, it is desirable that judges abstain from any informal or non-procedural communication with attorneys during legal proceedings in which such attorneys are involved. In this case, if such communication cannot be avoided as a result of too close relations between a judge and an attorney, such attorney is recommended not to participate in a case allocated to the judge who is his/her friend, while the judge is recommended to withdraw if he/she is allocated such case. This would allow to avoid any ambiguous situations or ambiguous assessment of the final judgement in respect of the other party/parties participating in legal proceedings. On the other hand, it should be emphasised that the informal and close communication of a judge and an attorney alone should not be treated as a violation of ethics, provided these persons do not constantly participate in same legal proceedings[8].

Attorneys are aware of this issue, therefore, they conduct themselves so as to prevent any unnecessary doubts regarding impartiality of a judge. A well-known Lithuanian attorney and a University professor states that "You can be accused of opacity. It is very unpleasant. Everybody must act so as not to give any person – whether more educated or less educated, whether suspicious or edgy, or whether tired of litigation – any reason to doubt impartiality of a court or the morals of a judge, an attorney or a prosecutor. It is the duty of all participants of legal proceedings, and we have to obey it even if our inner voice says that it is going overboard. Legal sophistication of the society is increasing. The fact that the perception of certain values should change gives the biggest hope."[9] Other countries, which probably have more legally sophisticated societies, other traditions and values, also have different relations between judges and attorneys. For instance, nobody would make any noise in the US or in the UK if they saw a judge and an attorney having lunch together: in the US, one Lithuanian attorney visited a club where the participating attorneys, judges and prosecutors gather together after the hearing and discuss, comment, state what professional errors have been made, and exchange their opinion. However, this is done after the completion of the hearing, which is transparent and impartial. Unfortunately, we live in a different society, and we still have a strong fear of what others may think or that one may say too much[10]. In Germany, boundaries of communication with attorneys are also rather open, e.g. the District Court of Lünen organises annual meetings with attorneys during which they go on tours, hold parties or engage in other interesting activities. According to German judges, this is so because, first, a huge part of the population trusts and respects courts

[8] *Ibid.*
[9] Jokimaitė-Dolgich Živilė. *Teisėjas ir advokatas – vienos teisingumo maðinos sudėtinės dalys*. Consulted on 4 May 2015. Available online <http://www.teismai.lt/data/public/uploads/2015/03/d1_web-teismai.lt-zurnalas.pdf>.
[10] *Ibid.*

and judges; second, in Germany, the judges' work is traditionally well-paid, provides security and excellent social guarantees[11].

Some think that it would be useful for Lithuania to shift towards a model of a more open communication of attorneys and judges; however, the low trust in courts[12], the existence of certain values of the society as well as recent issues regarding the stability of social guarantees of judges lead to the conclusion that it is still to early to expand the boundaries of communication between attorneys and judges. However, Lithuania should follow the rules prescribed by the Code and the ECHR; this implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be held objectively justified[13]. This "objective test" is generally related to hierarchical or other relations of a judge and other participants of legal proceedings. In each case a decision should be made whether the nature and degree of the discussed relationship is such as to indicate the lack of judicial impartiality. What is at stake is the confidence which the courts in a democratic society must inspire in the public and, first of all, the parties of legal proceedings. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw[14].

In summary, we can draw a conclusion that the judge's communication with other participants of legal proceedings must have boundaries, which means that the limitation of the judge's right to respect for his/her private life[15] is legitimate. Otherwise, when there is a legitimate reason to fear that a judge lacks impartiality, the institute of withdrawal must be employed (in this case the judge's right to respect for his/her private life shall not be limited).

2. ISSUES RELATED TO THE APPLICATION OF THE PRINCIPLE OF INDEPENDENCE

Judicial independence is one of the key principles of judicial conduct on which the system of justice of any democratic state is based. The Republic of Lithuania is no exception. Therefore, the principle of judicial independence is laid down not only in the Code of Ethics of Judges of the Republic of Lithuania

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[11] *Ibid.*

[12] Based on the latest data, a mere 24.5% of the population trust courts, and this number is an increase as compared to previous studies. Consulted on 4 May 2015. Available online <http://www.vilmorus.lt/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=2&cntnt01returnid=20>.

[13] Ferrantelli and Santangelo v. Italy, 7 August 1996, Reports 1996-III.

[14] Castillo Algar v. Spain, 28 October 1998, Reports 1998-VIII, § 45.

[15] Article 8 (Right to respect for private and family life) of the Convention of Human Rights and Fundamental Freedoms.

(Article 5(4) and 9)[16], but also in the supreme legal act of the Republic of Lithuania, viz. the Constitution of the Republic of Lithuania (Article 109(2) and (3))[17]; this principle is also thoroughly discussed in the Law on Courts of the Republic of Lithuania that is the principal law regulating the operation of courts and statutory guarantees of judges (Articles 2-3, 5, 10-11, 36(9), 45-50, 102(2), 119(1) and 124(2)(1))[18].

Legal provisions of the listed legal acts allow to conclude that the objective of the principle of judicial independence provided in the legal framework of the Republic of Lithuania is to ensure that a judge be free of any outside influence (political, economic, social, administrative supervision exercised by judicial authorities, etc.) and to administer justice only according to law which he/she shall appropriately apply after objectively and impartially investigating the merits of the case. It is the "appropriate application of law" that stirs discussions of the Lithuanian public and the community of judges of where to draw the line between the guarantee of the principle of judicial impartiality that allows the judge to decide by himself/herself which rule of law to apply, and the grounds for incurring the disciplinary liability for the judge for the misapplication of law.

Very often participants of legal proceedings or members of the public dissatisfied with the court judgement appeal to the Judicial Council or the President of the relevant court requesting to start disciplinary proceedings against the judge for the misapplication of law. The majority of such appeals are dismissed by the Judicial Council, which states that principal rules are related to the content of the principles of judicial independence, viz. during the hearing of a case and the application of law a judge is independent and no one has the right to interfere with his/her activities; a judge is not liable for the misapplication of law, while the validity and legitimacy of his/her judgement is verified through the instance judicial system[19]. However, the Judicial Ethics and Discipline Commission of the Republic of Lithuania also adopt other decisions stating that a judge should be subject to disciplinary liability for the misapplication of law. The adoption of such decisions is, first of all, the result of rather abstract grounds for invoking the disciplinary liability of judges provided in Article 83(2)(1) of the Law on Courts of the Republic of Lithuania[20], viz. an action demeaning the judicial office, which is defined in Clause 3 of the same Article as:

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[16] http://www.teismai.lt/en/self-governance-of-courts/judicial-ethics-and-discipline-commission/about-comission/667
[17] http://www3.lrs.lt/home/Konstitucija/Constitution.htm
[18] http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_e?p_id=21145&p_tr2=2
[19] Par. 7 of Minutes No 14 of 2010, par. 1 of Minutes No 2 of 2011, par. 6 of Minutes No 2 of 2011, etc., of the Judicial Ethics and Discipline Commission of the Republic of Lithuania.
[20] http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_e?p_id=21145&p_tr2=2

1. an act incompatible with the judge's honour and in conflict with the Code of Ethics of Judges of the Republic of Lithuania whereby the office of the judge is discredited and the authority of the court is undermined;
2. any misconduct in office – negligent performance of any specific duty of a judge or omission to act without a good cause.

It is the definition given by the legislator that a negligent performance of any duty of a judge is an action demeaning the judicial office that institutions of self-governance of courts interpret as the grounds for starting disciplinary proceedings against a judge for the misapplication of law; however, only if one of the following four criteria is met:

1. the application of law by the judge is manifestly incorrect;
2. the judge repeatedly applies law incorrectly;
3. the judge delays court hearings on unjustified grounds.

The analysis of the first criteria raises a question of whether concept "manifestly incorrect" can be an objective and constant measure that all or at least the majority of persons would understand in the same way. Does concept "manifestly incorrect" mean that it must be apparent to each average person that law is applied incorrectly (bonus pater familias standard of behaviour)? Should it be apparent to each professional lawyer that law is applied incorrectly? Or should it be apparent to each judge with average experience that law is applied manifestly incorrectly? etc. One of the examples that shows different approaches to this criterion the best is the case when a participant of legal proceedings appealed to the Judicial Ethics and Discipline Commission of the Republic of Lithuania requesting to initiate disciplinary action to the panel of three judges because the panel of judges misapplied a rule of the procedural law and referred a civil case, which fell within the jurisdiction of courts of general jurisdiction, to an administrative court. The President of the court of the higher instance who supervises the administrative actions of the court of the lower instance the panel of judges of which passed the said judgement analysed the appeal of the participant of legal proceedings and decided that there were no grounds for deciding on the starting of disciplinary proceedings against the panel of judges for the misapplication of a rule of the procedural law, because nobody could interfere with the administration of justice, while the legitimacy of the court judgement could be verified following the instance procedure. However, the Judicial Ethics and Discipline Commission of the Republic of Lithuania adopted a different decision; it decided that the panel of the three judges failed to follow the explicit and established practice of the panel of judges and, therefore, their judgement demonstrated a lack of professionalism and competence[21].

[21] Par. 6 of Minutes No 5 of 2011 of the Judicial Ethics and Discipline Commission of the Republic of Lithuania.

Also, mention should be made of a case, which caused quite a stir in the Lithuanian society, when a judge considering a prosecutor's petition to detain a person being sought internationally decided to order a home detention; however, the accused failed to comply with such provisional measure and escaped abroad. This court order was reversed by a court of the higher instance, while top politicians of the Republic of Lithuania and some representatives of self-governance of courts stated in the media that the judge has made a manifestly incorrect judgement and, thus, has demeaned the judicial office; therefore, he has to be dismissed from office. The Judicial Council of the Republic of Lithuania asked the Constitutional Court of the Republic of Lithuania to provide interpretation of whether the situation when a judge applies law manifestly incorrectly and escapes any liability for doing so due to guarantees of independence of judges is compliant with the principle of independence of judges, i.e. disciplinary proceedings against the judge cannot be started. The Constitutional Court of the Republic of Lithuania explained that "the fact alone that the review of the judge's judgement by the court of the higher instance following the procedure laid down by the procedural law has led to the change or recall of such judgement because of misinterpretation and/or misapplication of law or the violation of the procedural law does not provide any grounds for subjecting the judge to disciplinary action, dismissing the judge from office pursuant to Article 115(5) of the Constitution of the Republic of Lithuania by stating that such actions of the judge demeaned the judicial office; – the continuous gross misinterpretation and/or misapplication of law, the continuous apparent gross violation of the procedural law committed by a judge when making a judgement shall be the grounds for the institution/institutions of self-governance of courts with relevant competence to assess the judge's conduct as an improper discharge of his/her duties (inter alia negligent hearing of the case) and a lack of the required professional competence, to subject the judge to disciplinary action and to state that such actions of the judge demeaned the judicial office; the system of self-regulation and self-governance of judicial authorities must function so as to provide preconditions for dismissing the judge who demeans the judicial office.[22]" In this case the Constitutional Court of the Republic of Lithuania provided its opinion not only on the first but also on the second criterion by explaining that continuous or frequent rather than a one-off misapplication of law may be the grounds for subjecting a judge to disciplinary action by stating that such incompetent decisions of the judge demeaned the judicial office, which in turn becomes the ground for dismissing the judge from office.

Mention should also be made of another case where a judge took the position that the jurisdiction of civil cases of a certain type was not territorial; a court of the higher jurisdiction kept reversing the rulings of

[22] Decision No KT9-S6/2014 of 10 March 2014 of the Constitutional Court of the Republic of Lithuania in Case No 16/98 concerning the interpretation of provisions of the ruling of 21 December 1999 of the Constitutional Court of the Republic of Lithuania.

this judge and kept sending back civil cases to her, and then the judge kept withdrawing from the hearing of such cases. The Judicial Council of the Republic of Lithuania has analysed an appeal of a participant of legal proceedings and has decided to institute disciplinary action against the judge, as the judge has been consistently ignoring the instructions and the case-law of the court of the higher instance, i.e. during the hearing of cases she kept ignoring one of the sources of law, viz. the judicial precedent, and as a result the issuing of several court orders has been delayed on unjustified grounds; according to the Judicial Council of the Republic of Lithuania, the judge's conduct of ignoring consequences for participants of legal proceedings was an inappropriate and non-efficient performance of her duties; such conduct and procedural decisions of the judge and their consequences demean the judicial office, fail to protect the judicial honour and goodwill, and undermine the judicial authority[23]. The Judicial Court of Honour of the Republic of Lithuania has issued a judgement (severe reprimand was imposed on the judge) on this matter (as the judge's conduct was continuous and repetitive); therefore, the judge appealed to the European Court of Human Rights regarding the imposed disciplinary sanctions; the case is still pending. Thus, the "repetition" of the second criterion allows to draw a conclusion that the consistent and principled conduct of a judge of deliberately ignoring instructions of a court of the higher (even though not final) instance in specific legal proceedings is treated by institutions of self-governance of courts of the Republic of Lithuania as an action demeaning the judicial office.

It should be noted regarding the third criterion "delay of court hearings" that this criterion is sufficiently explicit and does not cause any legal discussions in the institutions of self-governance of courts of the Republic of Lithuania. The law explicitly defines situations when judges are obliged or entitled to delay or suspend the hearing of a case, or to take a break. Even though the list of such situations is not finite, the Republic of Lithuania strictly adheres to the principle not to prolong court hearings without a sufficient reason, and presidents of courts of the higher instance exercise a strict administrative control of judges of the lower instance in respect of the length of proceedings. As a result, the EU Justice Scoreboard published by the European Commission shows that Lithuanian courts are among the courts in Europe that need the least time to resolve cases; however, they are among the top ten European courts that get the biggest number of incoming cases[24].

With due consideration to the above, we can draw a conclusion that the system of self-governance of courts of the Republic of Lithuania still does not have a well-established boundary of the principle of judicial impartiality that prohibits from starting disciplinary proceedings against a judge for his/her

[23] Decision No 18P-6 of 9 March 2015 of the Judicial Council of the Republic of Lithuania to institute disciplinary action against judge R. A.

[24] 2015 EU Justice Scoreboard, http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf

judgement reversed by a court of the higher instance, which makes judges feel insecure and encourage further discussions of complete independence of judges (from politicians, public opinion, presidents of the higher instance who administer the activities of judges, institutions of self-governance of courts, etc.).

3. ISSUES RELATED TO THE BOUNDARIES OF THE JUDICIAL FREEDOM OF EXPRESSION

Article 10 of the Convention of Human Rights and Fundamental Freedoms provides that everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The Constitution of the Republic of Lithuania provides that freedom of thought shall not be restricted and that the human being shall have the right to have his own convictions and freely express them. Does this supreme constitutional provision also apply to a person who is a judge? If so, then to what extent? Which legal act – the Constitution or the Code of Ethics of Judges – shall have the priority and how should the conflict of rules of law be solved? A judge is subject to especially high standards of professional and even personal conduct, while improper conduct that is incompatible with the judicial ethics may lead to the review of his/her conduct by the Judicial Ethics and Discipline Commission or the Judicial Court of Honour, or even institution of disciplinary action.

Which approach to his/her conduct must and can a judge choose in order to remain professional and ethical member of his/her guild and at the same time be public-spirited and responsible member of the public who cannot close his/her eyes at the new legislative nonsense or a specific case that is publicly discussed everywhere and by everybody?

Judge of Vilnius Regional Court Audrius Cininas has been a judge for over 20 years and has investigated dozens of cases that triggered extraordinary attention of the public. He was the first in Lithuania to decide to explicitly explain to the public the reasons behind different judgements. The judge has been writing his blog since May 2012. In his blog, the judge states his position on issues such as the

amendment of rules of law, analyses aspects of the reduction of the workload of judges, provides information about actions taken in some criminal cases that he is investigating and that are of a special interest to the mass media and the public, and explains the reasoning of some of his judgements in simple non-legal language. At the same time the judge actively posts his thoughts, opinions and speeches on Facebook[25]. He has 1,368 Facebook followers, which is a rather significant indicator, considering that it is the first time in the Lithuanian judicial history that a judge publicly and regularly posts his statements online.

The following statement of the judge can be explained by the principle of *verbum sat sapienti* (Engl. a word is enough for a wise man):

"I can't stand any nonsense regarding the laws; I spill out everything in my writing, and this helps me feel better," said the judge when asked why he has chosen such form of self-expression. "Aren't you afraid that you'll get a negative reaction from your colleagues for opening the doors to the judicial kitchen? Have you received any direct reproaches?" we asked. "No, I have not received any reproaches. I am ready for discussions with anyone who thinks that one should not behave like I do and that such behaviour is incompatible with the ethics of a judge. When I write I always remember than I am a judge; therefore, I often "water down my tone"," said A.Cininas. "Wise people will understand; I want to show how sometimes the legislator manipulates people who don't understand that they are being manipulated."

On 11 March 2013, judge A.Cininas posted article "Irritable Legislation: Beat Your Wife Rather Than a Dog"[26] in his blog www.cininas.lt in which he criticises the proposal of V.Juozapaitis, member of the Seimas, to increase the penalty imposed by Article 310 of the Criminal Code of the Republic of Lithuania, which provides for the criminal liability for cruel treatment of animals, by increasing the maximum term of imprisonment from one to three years.

The vocabulary used by the judge in his article was the material element raising doubts as to the violation of the judicial ethics and the crossing of the boundaries of the permitted expression. The judge wrote, "The more I know people, the more I love dogs. This thought has crossed my mind when I've heard about the proposal to increase the penalty for those who do harm to animals, which was submitted by member of the Seimas V.Juozapaitis in the eve of the Women's Day. When similar initiatives to improve criminal law emerge, I always ask –WHY THE CRIMINAL CODE AGAIN? Why V.Juozapaitis who is a member of the Seimas Committee on Education, Science and Culture that has nothing to do with criminal jurisdiction? What was the chain of associations and what was the event that led the famous singer to

[25] https://www.facebook.com/audrius.cininas

[26] The article has also been republished in specialised web portal providing legal information www.infolex.lt //http://www.infolex.lt/portal/start.asp?Tema=54&str=52220

criminal justice, to Article 310 of the Criminal Code that protect the rights of animals and, ultimately, to the sanction of this Article? <...> The Code is a systemic act the rules and sanctions of which are adapted to one another like clock pinions and closely interact as a system. The proposal to amend one rule without any consideration to the entire system is equivalent to a whim to change the size of one clock pinion. But then it will either be too big or too small for the gear. Each first-year law student knows that a criminal penalty is the *ultima ratio* – the last resort – of the public. Criminologists warn that criminal law is inefficient way to solve problems of the public, as it impacts the outcomes rather than causes of a criminal offence; furthermore, it is expensive and has a strong adverse side effect. Criminology students also know that during the Middle Ages the majority of thefts occurred at the time of a public execution of thieves, while nowadays the measure of a sanction practically has no preventive effect. It is the inevitability rather than the measure of a penalty that has effect; unfortunately, the police will be of no help in the nearest future, as they have other engagements, such as the suppression of domestic violence.

The response of the member of the Seimas came at lightning speed and it is worth quoting it in full: "Honourable judge Audrius Cininas, today I had the pleasure of reading your pop article aimed at discrediting juozapaitis and similar dilettantes and at public showing of contempt... I'll be honest with you, I appreciate your literary talent just as I appreciate your sophistication in the area of culture. Not every colleague of yours knows that juozapaitis is an opera soloist. And what is more – he is also a professor and the Lithuanian National Prize winner. Oh, I've forgotten to mention the title of the Bearer of the Cross of Officer of the Order for Merits to Lithuania. Of course, these achievements have nothing to do with criminal law. Probably your knowledge of this field is better than mine. I say "probably" because I also studied some law, and one of the examinations I had to pass was an examination in criminal law. In any case, I have a better knowledge of law than you have of music... But maybe that's the reason, maybe you are tortured by the syndrome of unfulfilled dreams and you can feel better by humiliating a member of the *Seimas*? <...> Thus, I am not a crazy narcissist seeking to become popular at any price... You are fully aware that I overtake you in this field as well... But if you are sincerely concerned about the legislation and law enforcement and about the judicial image, please state at least one reason why it should be of no concern to me? Yes, you administer justice on behalf of the State. But you are also fully aware that laws are adopted by the *Seimas*, which represents the nation and has all the required authority. And, much to your regret, members of the *Seimas* who took an oath are not distributed into singers, cooks, brewers, etc. Why have you turned a blind eye at the competence in the field of legislation of the former Chair of the Commission for Ethics and Procedures and the present Chair of the Committee on Environment Protection? Hasn't he submitted amendments to the Criminal Code? During almost two decades, with virtually no education at all,

he for sure contributed to more than one initiative, which turned into a law that you must unconditionally obey today..." The judge has posted the full letter of the member of the *Seimas* in his blog[27].

The statements and outbursts of which one – the judge or the member of the *Seimas* – is in the periphery of his professional ethics?

The member of the *Seimas* of the Republic of Lithuania appealed to the Judicial Ethics and Discipline Commission stating that in the published article judge A. Cininas has mockingly reminded the original occupation of the member of the *Seimas* and has deliberately and persistently doubted his competence and ability to perform the duty of a representative of the Nation, and requested the Judicial Ethics and Discipline Commission to assess the judge's conduct, which allegedly violated the principle of the separation of powers and demeaned the name of the member of the *Seimas* of the Republic of Lithuania authorised to represent the Nation.

Having assessed the ethical aspect of the conduct of judge A. Cininas, the Judicial Ethics and Discipline Commission did not institute disciplinary action against the judge; however, it stated in its conclusion that the judge's statements were non-compliant with judicial ethics and that the judge had to choose arguments of his statements and the method of presentation of such arguments with due consideration to the fact that he must always ensure the honour and goodwill of the judicial office and the compliance with the principles of ethics of judges. The principles of decency and exemplarity provided in Article 14 and Article 14 of the Code of Ethics of Judges require for each judge to be of irreproachable character, to act with restraint, correctly and politely at work and in other public activities, also in private life, not to speak with scorn, and to show the example through his/her conduct and language in his/her professional activities and in private life. The Commission noted that the judge must not minimise other persons who perform their duties and must show due respect to them.

Judge A.Cininas disagreed with such conclusion of the Judicial Ethics and Discipline Commission and appealed to the Judicial Court of Honour requesting to defend his judicial honour and dignity and to reverse the unfavourable conclusion of the Commission; he also noted that the decision of the Commission did not institute disciplinary action but still stated that the judge committed a misconduct.

The Judicial Court of Honour referred to the provisions of the Constitution of the Republic of Lithuania providing for the right of a human being to have his own conviction and freely express them[28], and guaranteeing citizens the right to criticise the work of State institutions or their officials and to appeal

[27] http://www.cininas.lt/?p=459#more-459

[28] Article 25 of the Constitution of the Republic of Lithuania // http://www3.lrs.lt/home/Konstitucija/Constitution.htm

against their decisions, and prohibiting persecution for criticism[29]. The Judicial Court of Honour quoted the case law of the European Court of Human Rights[30] stating that freedom of expression constituted one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. The Judicial Court of Honour also noted that the constitutional right to criticise the work of State institutions or their officials is guaranteed to each citizen; therefore, the criticism of a draft law cannot be considered to be a violation of the principle of the separation of powers or the limitation of the right (the authorisation) of members of the *Seimas* to initiate draft laws.

In summary, it should be concluded that the judge, just like any other citizen of the Republic of Lithuania, enjoys all the rights granted to him by the Constitution, viz. the right to have his own conviction and freely express them, including the right to criticise the work of State institutions or their officials, and these rights are not absolute rights and are limited only by law. Standards of judicial conduct online have not been formed yet in the Republic of Lithuania; however, with due consideration to the universal digitalisation, it is apparent that the direct exercise of one's constitutional rights online may become the grounds for analysing the ethical aspect of the judge's actions.

CONCLUSION

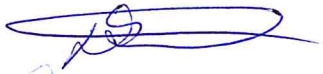
1. The judge's communication with other participants of legal proceedings must have boundaries, which means that the limitation of the judge's right to respect for his/her private life is legitimate. Otherwise, when there is a legitimate reason to fear that a judge lacks impartiality, the institute of withdrawal must be employed (in this case the judge's right to respect for his/her private life shall not be limited).

2. The system of self-governance of courts of the Republic of Lithuania still does not have a well-established boundary of the principle of judicial impartiality that prohibits from starting disciplinary proceedings against a judge for his/her judgement reversed by a court of the higher instance, which makes judges feel insecure and raise further discussions of complete independence of judges (from politicians, public opinion, presidents of the higher instance who administer the activities of judges, institutions of self-governance of courts, etc.).

3. The judge, just like any other citizen of the Republic of Lithuania, enjoys all the rights granted to him by the Constitution, viz. the right to have his own conviction and freely express them, including the

[29] Article 33 of the Constitution of the Republic of Lithuania // http://www3.lrs.lt/home/Konstitucija/Constitution.htm
[30] European Court of Human Rights, Case of Kudeshkina v. Russia, Judgement of 26 February 2009, 29492/05)

right to criticise the work of State institutions or their officials, and these rights are not absolute rights and are limited only by law. Standards of judicial conduct online have not been formed yet in the Republic of Lithuania; however, with due consideration to the universal digitalisation, it is apparent that the direct exercise of one's constitutional rights online may become the grounds for analysing the ethical aspect of the judge's actions.



Judge Darius Pranka

Judge Rūta Poniškaitytė

Judge Viktorija Šelmienė

BIBLIOGRAPHY

1. Judgement of the European Court of Human Rights: Daktaras v. Lithuania, No 42095/98, 10 October 2000.

2. Judgement of the European Court of Human Rights: Fey v. Austria, 24 February 1993, Series A No 255, § 27, 28 and 30.

3. Judgement of the European Court of Human Rights: Wettstein v. Switzerland, No 33958/96, § 42, ECHR 2000-XII.

4. Judgement of the European Court of Human Rights: Ferrantelli and Santangelo v. Italy, 7 August 1996, Reports 1996-III.

5. Judgement of the European Court of Human Rights: Castillo Algar v. Spain, 28 October 1998, Reports 1998-VIII, § 45.

6. Judgement of the European Court of Human Rights: Kudeshkina vs. Russia, 26 February 2009, 29492/05)

7. Jokimaitė-Dolgich Živilė. *Teisėjas ir advokatas – vienos teisingumo mašinos sudėtinės dalys.* Consulted on 4 May 2015. Available online <http://www.teismai.lt/data/public/uploads/2015/03/d1_web-teismai.lt-zurnalas.pdf>.

8. The ruling of the Supreme Court of Lithuania in Civil Case No 3K–3–389/2007.

9. The ruling of the Supreme Court of Lithuania in Civil Case No 3K-3-1/2004.

10. The Code of Ethics of Judges of the Republic of Lithuania (approved by Resolution No 12P-8 of 28 June 2006 of the general meeting of judges of the Republic of Lithuania). Consulted on 1 May 2015. Available online <http://www.teismai.lt/en/self-governance-of-courts/judicial-ethics-and-discipline-commission/about-comission/667>.

11. The Judicial Ethics and Discipline Commission of the Republic of Lithuania. Consulted on 1 May 2015. Available online <http://www.teismai.lt/en/self-governance-of-courts/judicial-ethics-and-discipline-commission/about-comission/667>.

12. The Judicial Court of Honour of the Republic of Lithuania. Consulted on 1 May 2015. Available online <http://www.teismai.lt/en/self-governance-of-courts/judicial-court-of-honour/about-court/664>.

13. The Constitution of the Republic of Lithuania, Official Gazette *Valstybės žinios*, 1992. No 33-1014. Available online <http://www3.lrs.lt/home/Konstitucija/Constitution.htm>;

14. The Law on Courts of the Republic of Lithuania, Official Gazette *Valstybės žinios*, 1994, No 46-851. Available online <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_e?p_id=21145&p_tr2=2>;

15. Par. 7 of Minutes No 14 of 2010, par. 1 of Minutes No 2 of 2011, par. 6 of Minutes No 2 of 2011 of the Judicial Ethics and Discipline Commission of the Republic of Lithuania. Available online <http://www.teismai.lt/data/public/uploads/2015/01/tek-praktinis-vadovas-2014.pdf>;

16. Par. 6 of Minutes No 5 of 2011 of the Judicial Ethics and Discipline Commission of the Republic of Lithuania. Available online <http://www.teismai.lt/data/public/uploads/2015/01/tek-praktinis-vadovas-2014.pdf>;

17. Decision No KT9-S6/2014 of 10 March 2014 of the Constitutional Court of the Republic of Lithuania in Case No 16/98 concerning the interpretation of provisions of the ruling of 21 December 1999 of the Constitutional Court of the Republic of Lithuania.

18. Decision No 18P-6 of 9 March 2015 of the Judicial Council of the Republic of Lithuania to institute disciplinary action against judge R. A. Available online <http://www.teismai.lt/data/public/uploads/2015/04/tedk-sprendimas-del-r-augustes-2015-03-09-2.pdf>;

19. Murauskienė Dovilė. *Teisėjo bendravimas su advokatu: ribos, turinys ir visuomenės požiūris.* Consulted on 3 May 2015. Available online http://www.delfi.lt/news/daily/law/teisejo-bendravimas-su-advokatu-ribos-turinys-ir-visuomenes-poziuris.d?id=67356336#ixzz3Xqx59vY9;

20. 2015 EU Justice Scoreboard. Available online http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf;

21. Judgement No 21P-4 of 12 May 2014 of the Judicial Court of Honour.