INTERNATIONAL ASSOCIATION OF SUPREME ADMINISTRATIVE JURISDICTIONS

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Deontology
Athens Seminar, September 2020

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Summary of the responses to the questionnaire

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As of July 21, 21 countries responded to the questionnaire

1. Rules, Texts

1.1. All the countries that responded to the questionnaire know, in one form or another, principles and rules of conduct applicable to judges. The specificities of the judicial function explain that the essential guarantees of impartiality, probity, honour etc. almost always come under the Constitution. They are frequently declined and supplemented by the law, especially regarding the status of judges. This applies to countries which have a Code of Ethics strictly speaking as well as to those which do not.

20 of these countries have a Code of Ethics for Administrative Magistrates. In 2 of these countries, this Code concerns only the supreme courts (Federal Constitutional Court in Germany and Federal Court in Switzerland). In 3 other countries (Benin, Morocco, Portugal), a reflection is underway or a code is about to be adopted. Some are imposed by law, others not. Only Greece, Sweden and Belgium do not have a Code.

Where they exist, these Codes are usually presented as setting out latent rules, seen as consubstantial to jurisdictional functions. Their elaboration was an opportunity to express them and, often, to explain their meaning and scope. It is observed that these Codes are never presented as having truly "created" law.

The Codes are generally conceived as guides and to help judges to solve the ethical questions they face: they are tools at their disposal to help them carry out their duties. The stated rules are rarely presented as truly binding – they are close to soft law – but they can serve -as a minimum- as disciplinary "benchmarks". The articulation of ethical rules with disciplinary law makes their nature often ambiguous: non-binding, but not only informative. The rules resulting from the law are of course always binding.

It has to be noted that the existing Codes are easily accessible to the public, in particular on Internet: this reveals one of their essential objectives, which is to strengthen the confidence of litigants and lawyers in the justice system.

1.2. Where Codes exist, they are drawn up and adopted, in most cases, by a "Superior Council of Justice", mainly composed of judges, but also representatives of the executive

branch and, sometimes, of the University and the Bar. However, the competent body may be composed solely of judges (in Hungary, Luxembourg or Norway, for example, where the Judges' Association is the originator of the Reports), or even that jurisdiction may be vested in the head of the judicial order in question (in France for example, but after the opinion of the College of Ethics).

In most cases, too, the preparatory work for these Codes was developed in consultation with the Bar and the University. These professions are generally associated with the judges on the committees entrusted with this work. It should be noted, however, that in some countries, such as Germany and Switzerland, the preparation and adoption of the Codes resulted from purely internal work without consultation.

Even where it is not expressly provided for, the updating of the Codes is possible in all the countries which have them and about half of them have already made such updates.

1.3. 14 of the countries that responded have two separate orders of jurisdiction and have adopted a Code of Ethics: in 7 of them, this Code is common to both orders of jurisdiction. Only in France and Italy does a specific Code to the administrative order exist. But in Portugal and Greece, the Code in preparation should also apply only to administrative courts.

Only Colombia, Switzerland, Germany, Italy and Turkey have a specific Code for the Supreme Court (note that in Turkey and Colombia, this Code comes in addition to a set of ethical rules common to all levels of jurisdiction). In all other cases, the rules apply equally to all levels of jurisdiction.

In all cases, the ethical rules apply only to judges, a category in which referendaries can be included, as in Finland. Administrative agents and court clerks are not in principle directly concerned by these rules: they are generally subject to those governing the rights and duties of public officials, except in a few countries where special ethical rules are also provided for administrative agents of the courts. One exception, however, is Colombia, whose Code contains certain provisions that also apply to agents.

Where they exist, Codes never directly concern the members of the family of the magistrates, that is to say, they do not oblige them. Their situations may nonetheless be taken into consideration to assess, for example, a conflicts of interest or impartiality of a judge.

2. Institutional framework and competent bodies

In 13 of the countries that responded to the questionnaire, no body responsible for answering the ethical questions raised by judges has been set up. In 3 of them, however, the magistrates who encounter such a difficulty are invited to address their heads of jurisdiction who, as indeed in many countries where a specific body exists, are the first deontologists.

In countries that have a body specifically tasked with answering ethical questions, it is most often a branch of the “Superior Council of Justice”. Its composition then reflects that of the council, consisting mainly of magistrates but also representatives of the executive and various experts. In a few countries, such as Italy and France, a college exclusively dedicated to ethical issues is there to regulate the ethics of magistrates and, if necessary, answer their questions. Finally, it should be noted that in Switzerland, a private law association is responsible for fulfilling this function.

Where it exists, this body can generally be seized only by magistrates, or on its own initiative, but not by persons outside the profession. The opinions and recommendations it makes have no more binding value than the rules set out in the Codes: we observe a fairly natural parallelism in the value of the basic texts and the interpretations that are given, on a case-by-case basis, at the request of the magistrates. However, their practical scope remains important. Some countries make these notices public, others do not: it is difficult to identify a dominant trend in this respect.

The referral is open to persons outside the courts in some countries: but in these cases, the boundary between the fields of ethics and discipline is blurred. The Norwegian example is topical: any person who considers himself the victim of an «ethical fault» on the part of a judge may refer the matter to the competent committee. If the complaint is found to be admissible, an adversarial procedure is then opened, which may lead to disciplinary action.

2.2. Only 3 countries do not provide for any training of judges in ethics. In all other countries, training modules are provided: often from initial training and always as part of continuing training. Such training is only compulsory in about half of the countries represented.

2.3. In the vast majority of the countries that responded to the questionnaire, the ethical principles and rules apply only to active judges. In some of them, they also apply to retired magistrates, who, for example, remain bound by the secret of deliberation and must not behave in a manner that undermines the dignity of justice. In countries where members of the administrative jurisdiction frequently perform outside functions during their careers, as in France, the scope of the rules is wider. There are generally no specific rules for the presidents of the courts, except for example in France where specific provisions govern the exercise of activity after retirement. Two countries only specify principles monitoring their responsibilities as managers.

In few countries compliance with the rules of ethics is specifically taken into account when assessing judges. However, except in countries where there is no procedure for assessing judges – for example in Norway and Luxembourg – ethical considerations are never absent from the assessment of the manner of serving.

The question of the relationship between ethics and discipline is a delicate one, given the prima facie non-binding nature of the rules of ethics. The fact remains that the content of ethical rules frequently overlaps with disciplinary rules, so that ethical breaches can often also be akin to disciplinary breaches: for example for conflicts of interest or breaches of the duty of reserve in the public expression of the magistrates. While it is rare for a breach of ethics alone to constitute a disciplinary sanction, ethics can always serve as a “reference” in the assessment of disciplinary misconduct.

The legal channels open to litigants to react if they consider that a magistrate has violated rules of ethics are very varied according to the countries: in half of them, it is possible to refer the matter to the president of the jurisdiction. The possibility of asserting certain breaches in the context of an appeal (appeal or cassation) against the judicial decision obtained is also generally open. Some countries also provide that litigants may refer to the disciplinary body of the “Superior Council of Justice” which may then initiate disciplinary proceedings.

3. Scope of application

3.1. The general principles of judicial ethics are the same in all countries that responded to the questionnaire: independence, impartiality, diligence, integrity, etc. Some other principles, such as courtesy, transparency or professionalism, are also sometimes cited. Several of the countries that responded made explicit reference to the Bangalore Principles on Judicial Ethics, which clearly influenced their ethical thinking.

Where a Code exists, it usually contains a statement of general principles and explanations and comments. Only a few countries, such as Norway, have chosen to stick to the general principles, believing that they are sufficiently clear and need not be explained.

Almost all countries consider that the non-removabillity of judges is the main guarantee of their independence; some also cite guarantees of advancement and discipline, entrusted to a «superior council of justice» independent of the executive power.

Non-removability finds its translation in the prohibition of transferring a magistrate without his consent. This prohibition, which applies not only to the executive but also to the higher authorities in the judicial order concerned, is provided for in all countries except Cyprus, where the "Superior Council of Justice" seems to be able to transfer the judges to another court as it sees fit. There are, however, two exceptions in most countries: disciplinary transfers and transfers for reorganization of the service. It should be noted that in Norway, for example, an impeachment procedure conducted before Parliament allows in theory to end the life mandate of members of the Supreme Court.

There is a considerable disparity in the way cases are assigned to judges: most countries reply that the cases are assigned on the basis of objective criteria such as the specialisation of the Chamber and the Magistrate, experience or workload. In some of these countries, it is the law, if any, specified by a regulatory act that defines these criteria. In Belgium, Benin, Lithuania, Portugal and Slovakia, automated systems for awarding cases have been set up: most take these criteria into account, while others organise awarding on a random basis (in Belgium, linguistic dualism also determines the allocation of cases in Dutch-speaking and French-speaking chambers). Finally, in other countries, such as France and Luxembourg, a fairly wide margin of manoeuvre is left to the head of jurisdiction or the president of the chamber, but the criteria they use are in practice the same as in the countries where they are previously fixed.

Finally, there are few countries in which a magistrate can be held liable for a judicial decision. Virtually all judges can be disciplined, criminally or civilly prosecuted for acts committed in the course of their duties – as such, the possible procedures and immunities vary widely from country to country –, but not for the content of a judicial decision, which can in principle be reformed through the means of appeal (appeal, cassation and, possibly, revision).

3.2. In 20 of the countries that responded to the questionnaire, any political activity (party membership and election) is prohibited for judges. This rule is seen as a corollary of the principles of independence of justice and separation of powers. In Norway, Senegal, France and Italy, judges are in principle allowed to exercise an elective mandate, subject to incompatibilities arising in particular from the jurisdiction of their mandate and the court in which they have exercised, are exercising or are going to exercise. For example, in France, an administrative magistrate is not allowed to exercise a national mandate (senator, deputy or European deputy), but he may be a municipal or general councillor in a jurisdiction other than that of the court in which he exercises.

As regards the freedom of expression of judges, the rules are almost the same in all countries: freedom of expression is the principle, but given the nature of their functions, judges must exercise it with prudence and moderation. Only Sweden states that the freedom of expression of judges is no different from that of other citizens. Except in Sweden, all judges are held to a duty of reserve in order not to undermine the dignity of justice: its intensity varies at the margin between countries.

They are generally prohibited from publicly discussing ongoing cases, let alone publicly breaching the secrecy of the deliberation. Magistrates are almost always allowed to participate in the doctrinal debate and teach. About half of the countries have specifically addressed the issue of the use of social networks by magistrates, but in all cases it is the duties of reserve and prudence that guide this use.

Finally, practices are varied with regard to institutional communication: in some countries, only the supreme courts have a press service, which is then mainly composed of communication professionals. In most countries, each jurisdiction organizes its own communication, either through a delegated magistrate or through more structured communication cells. All countries recognize the value of communicating on court decisions.

3.3. When reading the replies to the questionnaire, it is difficult to say whether it is common for judges in the course of their career to hold positions in the active administration or the private sector primarily, particularly through secondment. Question No. 36 seems to have been understood as having to do with the possibility of engaging in secondary activities.

In Benin, Sweden or France, it seems common for administrative judges to temporarily cease their duties in order to work in the active administration or the private sector. Guarantees are provided such as, in France, the need to obtain the opinion of a specialised authority and to complete a declaration of interest, in Benin, to have previously worked for 10 years in the judiciary and to obtain the assent of the superior council of the judiciary, in Sweden to obtain the agreement of its hierarchy. In Turkey, the law expressly stipulates the types of jobs that magistrates may exercise in the public sector; no other guarantee, except the consent of the magistrate concerned, is for example set to regulate the appointment of judges to senior positions in public institutions. Secondments are probably more frequent in other countries than is apparent from the responses to Question 36.

As regards the possibility of performing secondary functions while continuing to exercise its judicial functions, this is possible in most countries provided that, generally, these new functions are effectively complementary to jurisdictional functions (such as teaching or participation in various working groups and committees). The ban on executive or managerial functions in the private sector seems to be shared by most countries.

In the case of gifts, all countries prohibit judges from soliciting or receiving gifts. In this respect, criminal rules punishing corruption are often cited in addition to ethical principles. It remains that the framework of this prohibition is more or less precise according to the countries: in some, the issue is not explicitly dealt with by the rules of ethics but the custom is sufficiently clear; in others, clarifications are made to take into account the nature and value of the gifts, the circumstances in which they are offered, their destination when they cannot be refused, etc. For example, the Cypriot Compendium distinguishes between gifts of modest value offered as a mark of recognition for a speech given by a judge and gifts of remuneration for a judge's

participation in an event that serves advertising purposes for a law firm or a company. Portugal and France explicitly tolerate gifts exchanged in a formal setting.

3.4. The rules of ethics most often do not directly regulate the private life of magistrates: but in all cases, the duties of honour, integrity, reservation, etc. continue to apply in the private setting and judges must refrain from any conduct that could undermine the dignity of justice. Some countries have more precise rules on the private life of magistrates, such as the Polish Code of Ethics or the Ethical Principles of Norway, which prohibit judges from making inappropriate use of their title of "judge" outside their functions, or the ethical rules of Benin which explicitly provide, for example, that judges should not be drunk in bars etc. or fight in public places.

The appearance of judges is never very specifically framed by the rules of ethics: except in the case of wearing the robe in court or during protocol events, judges must keep an appearance appropriate to the dignity of the judicial function. It should be noted that in Morocco, appearance is a criterion for assessing judges.

The issue of sexual discrimination and harassment on the part of judges is also rarely directly addressed by ethical rules: the general principles of courtesy, equal treatment and benevolence apply, and judges are always subject to ordinary law, including disciplinary and criminal law, prohibiting discrimination and harassment. Some countries go further: in Spain, for example, ethical principles state that judges must be actively committed to the dignity and equality of all people. In Slovakia, the Code of ethics explicitly prohibits judges from being members of organizations that promote hatred and illegal discrimination on the grounds of sex, racial and ethnic origin etc.

The same is true of the performance and productivity of judges: ethical rules are mostly limited to stating that judges must perform their duties diligently, efficiently, competently or celerity. Without being a specific and, even less, the main criterion of evaluation, performance always seems to be taken into account in one way or another in the evaluation of judges.

3.5. The most frequently encountered ethical problems seem to relate to the impartiality and withdrawal from specific cases by magistrates as well as the scope of their duty to reserve.