

Judicial Corruption – *Quis custodiet custodes?*¹

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Abstract:

The supposition that even jurisdiction can be influenced is undoubtedly a sensitive topic in democracies. A certain kind of myth of intangibility hovers around the functioning of courts. On the one hand, it is good, because the judicial power is one of the basic instruments of Rule of Law, and for this very reason it would be difficult for it to function within the cross-fire of constant criticism – coming mainly from the political and executive powers –, on the other hand, the respect for courts cannot mean the negligence of critical realist thinking either.

The topic of judicial corruption counts both in foreign² and in Hungarian literature³ as a rather poorly published matter. This is partly because of the low number of cases, partly because of the latency.

Quis custodiet custodes?⁴ – Who watches over the shepherds?⁵ – I asked this question in the title of the study. Who is entitled to check the course of justice? Most of the jurisdiction does not provide for it substantially. Presumably, the intense political manifestations are to be explained by it, which are to be observed in the politics or in the media in connection with certain court judgements of public interest.

International standards of judicial corruption cases show a high rate in the Latin countries.⁶ This figure is in Hungary so negligible – only a few cases have become known since the change of the system in 1989 – that accepting the official crime statistics, it might not be worth dealing with this phenomenon, but from the point of view of crime prevention, this kind of prevention can necessarily be useful. Corruption or the attempted intrusion into the independent and impartial functioning of judiciary can be assumed or perceived partly from the side of the executive power,

¹ Illés Károly Edvi, *Quis custodiet custodes?* [Who watches over the shepherds?], Jogállam, 1903. p. 478.

² Sergio Moccia, *Das korrumpierte Strafrechtssystem – Eine nur italienische Geschichte?*, [The corrupt criminal law system – only one Italian history?], In: Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001, hrsg.: Bernd Schünemann, Wilfried Bottke, Hans Achenbach, Bernhard Haffke, Hans-Joachim Rudolph, Walter de Gruyter, Berlin-New York, 2001. p.150.

³ László Kóhalmi, *Korrupció és hatalom* [Corruption and power], In: *Korrupció Magyarországon* (Ed.: Ferenc Csefkó Ferenc – Csaba Horváth), Pécs – Baranyai Értelmisségi Egyesület, PTE Állam – és Jogtudományi Kar, 2001. p. 150.

⁴ Edvi, *op. cit.*, p. 478.

⁵ Csaba Varga, *A jog mint folyamat*, [The law as a process], Budapest, Osiris Kiadó, 1999. p. 302.

⁶ Evaluation of Judicial Corruption in Central America and Panama and the Mechanism to Combat it. Executive Summary & Regional Comparative Study. Due Process of Law Foundation, Washington, D.C. 2007, p. “Judicial corruption in Central America is a serious problem and must be attacked purposefully and vigorously. Corruption in the judiciary erodes the rule of law, undermines democratic mechanisms, and conspires against adequate economic performance in the countries of the region.”

partly from the side of the private sector. In the following, this topic will be presented after a brief historical and theoretical overview.

Keywords: *judicial corruption; executive power; private sector; guarding the guardians; prevention.*

1. Historical retrospect

The issue was raised as early as in the Roman political literature, namely 'Who watches over the shepherds?'⁷ i.e. the necessity of the control of the guardians of political-executive power, but it remained only a desire to a large extent, because at that time the institutional control of the leaders had not been established yet.⁸ The need of controllability of leaders had been known in the ancient and medieval political thinking all along, yet the institutional solution of monitoring leaders had not been introduced anywhere,⁹ and not more than *ad hoc solutions were used* (e.g. driving away the tyrant).

From among the medieval thinkers, the doctrine of St. Thomas Aquinas on the dethronement and accountability of the tyrant deserves special mention.¹⁰

The establishment of the structure of the civil society and with it the gradual separation of the powers meant the real separation of the mandate of the administration and the justice, and the influence or the possibility of influence of the independent *justice* taken in the modern sense emerged not earlier than in the New Age with an increased importance. It should be noted that even today – however with limited authorisation –, the judicial power adhering to public management functions is to be found (e.g. the pardon power of the President of the Hungarian Republic).

The impeachment of those passing a sentence, i.e. the judges may arise from two aspects. First, history unfortunately provides a fair number of examples that *innocent* people are imprisoned and slandered for political, religious, ethnic, and race grounds – just think of the masses of people convicted in the Nazi, the communist or in the apartheid systems. (Unfortunately, earlier there were some among the Hungarian judges as well, who proved to be partners in serving inhuman political systems, e.g. in the sham show-trials. On the other hand, even in the so called modern justice systems, the possibility of error is inherent in the process of taking of evidence, and it is possible that a convicted person has not committed the acts alleged at him. This is commonly called "*Justizmord*" (miscarriage of justice).

While in the latter case – if the *judex* has conducted their task *lex artis* – no impeachment against the judge is required, the *praetor's* (judge's) criminal responsibility for making his judgment according to a concept is to be established, although the impeachment of judges is still a somewhat unclear issue¹¹ both in the field of regulations and in the literature.

⁷ Mihály Samu, *Jogpolitika* [Legal politics] Budapest, Rejtjel kiadó, 2000. p. 72.

⁸ Samu, *op. cit.*, p. 72.

⁹ Samu, *op. cit.*, p. 72.

¹⁰ Samu, *op. cit.*, p. 72.

¹¹ Samu, *op. cit.*, pp. 72-76.

2. Attempts of the executive power against the independence of the judiciary

In this section we attempt to answer the question, in which particular situation or field of the *practice* the influence of the judiciary by the executive power is possible.

2.1. The executive power appoints the judges from among its supporters and sympathizers¹²

In the Hungarian legal system, professional judges are appointed by the President of the Republic, so practically such a case is not likely to happen. However, it is a fact that it is the President of the National Judicial Office (hereinafter referred to as NJO) that proposes the appointment of judges. The President of the NJO is elected by the National Assembly, however, and this fact in turn inevitably leads to political elements, because the majority political parties in the Parliament elect a person who they find suitable for them. It would be better, perhaps, if the judges could choose the President of the NJO from among themselves or they would recommend three persons they deem appropriate for the post of Chief Justice and the Parliament could choose only from among these three persons. This solution is more in line with the principle of the separation of powers by *Montesquieu*.

The public sphere has been fairly *politicised* in Hungary since the change of regime of 1989, thus the post of the Chief Justice may easily become the subject of *political bargaining*.

However, getting the *judicial office* can take place not only through appointment but through choice as well (*e.g.* as in the US). In the case of a choice, there may be two conflicting principles: *populism* and *professionalism*. It is conceivable that the person with excellent professional skills but who is less familiar with *electoral tricks*, image-creation and electoral marketing, cannot win against a candidate who is popular but has modest professional qualities.

The participation of *lay* persons in the Hungarian judiciary is gradually less and less present. Earlier the so called people's assessors took part in the adjudication in a relatively wide range (especially in criminal matters and employment litigation), but with reference to the *acceleration* of the adjudication the lay element has been gradually suppressed in the Hungarian *judicature*. However, the real and by the power never mentioned reason was – in my opinion – *economy*. Thus, they can pay much less fee for the mandate of simple assessors, which is anyway a very modest remuneration (approx. 10 euro/process hour). The gradual marginalization of the lay element in justice is also contrary to the requirement of the separation of powers.

To obtain the assessor's mandate is seemingly a non-political issue, as according to the Act CLXII of 2011 on the status and remuneration of judges, assessors are designated by the representative body of local self-governments and associations, but it is the responsibility of the representative body of the local self-government at the headquarters of the District Court to elect the assessors of the given District Court. In the representative bodies – particularly in cities – there are the representatives of the parties, however, so there may come to political pressure here as well.

¹² János Bódi, *A korruptió mint társadalmi és büntetőjogi jelenség* [Corruption as a social and criminal phenomenon] Rendészeti Szemle 1991. pp. 1-28.

The issue of the personal composition of those making the judgments may become of growing importance in the case of the *jury*; which has a similar function as that of the assessors'. In the United States, the question often arises in connection with criminal cases – at least at the level of journalism – whether the different skin colour or the race of the jury influence the decision as to the guilt pro or con. The lottery-like jury selection method does not provide an institutional solution to resolve this problem either.

2.2. The "loss" of judicial documents

The "loss" of an important document submitted either in the trial phase or at an earlier stage may significantly affect the decision making. In our time when the technical developments provide countless opportunities for the reproduction of evidence, it is a legitimate expectation of the parties or the defendant to decide their case on the basis of original evidence and not on the basis of copies of uncertain origin. The deliberate loss of documents may be committed by those who have the right or the opportunity to have access to the files. However, it is a different case when the loss of a file is due to some negligence or fault. In practice, of course, the distinction is rather difficult, mainly because of the courts' operating with immense caseload, where there are almost chaotic filing conditions prevailing – due to lack of space –, and which may inadvertently lead to the disappearance of some documents.¹³ Still, these cases may give rise to the assumptions challenging the correct handling of cases. The e-filing (digital access) unfortunately does not work at the level of daily practice yet.

2.3. Selection of judges without discrimination

A basic requirement of the Rule of Law is that any person, regardless of their origin, nationality, religion, sex, skin colour or political opinions, i.e. free of discrimination, should be able to hold a judicial office. However, this principle – in my opinion – is not contradictory to the fact if only a citizen of a given country can become a judge, similarly to other professions representing state power. It is a question concerning the future what the governing rules would be concerning the determination of the composition of the court personnel in the event of the setting up of a "Single European Criminal Court".

2.4. The permanence of the judicial office and the irremovability of judges

It is not a negligible requirement that nobody should be dislodged from their office without *good cause* and *due process*. The Hungarian court law complies with this requirement, although the executive power has recently tried to send judges under 70 years of age but over the age of retirement (62 years) into retirement through legislative amendments.

2.5. Signalling abuse

The directed „*signalling-out*” of cases – when the so-called "friend judge" decides in a case – is easily to be prevented by accurate internal records management policy, which

¹³ László István Gál, *A pénzmosás és a terrorizmus finanszírozása az új magyar büntetőjogban* [Money laundering and], *Belügyi Szemle* 2013/6. pp. 28-35.

has been solved at domestic courts. The sentencing judges are given the files according to a pre-established case-distribution order, and if any bias or interest on behalf of the judge arises in relation with any participants of the legal dispute, the judge is obliged to report it and he cannot deal with that particular case.

2.6. The judicial administration and the financial appreciation of judges

It is a fundamental requirement that the *government* should affect the operation of the courts and the decision making in any administrative way. The law provides, however, that the judicial base salary is determined by the Act on the central budget and its sum cannot be less than that of the amount in the previous year, but I do not consider it to be sufficient.

An *impartial* and influence-free adjudication¹⁴ is to be expected from a person who has got guaranteed stability and economic independence and who is not forced to carry out other work because of living issues or whose low income does not create a *corruptible* situation.¹⁵ In addition to fulfilling the office of a judge, a judge may carry out only scientific, artistic, literary, educational or technical creative work as a gainful activity, but all these can be done only if they do not threaten their independence, their impartiality or they do not hinder the fulfilment of the duties of their office.

2.7. Depriving someone from his/her legal judge

It is a fundamental *guarantee* rule of the judicial procedure that nobody can be deprived from their legal judge (court), *i.e.* from the judge having authority and venue.

During the period of communism in Hungary, the Supreme Court could take over a case at any stage of the process for judgment, and it is conceivable that it might have given way to the enforcement of factors other than law.

3. The dangers of the intrusion of the private sphere

Sometimes the justice-seekers do not shy away from using means prohibited by *criminal law* in order to enforce their perceived claims. The history of Hungarian crime can hardly present any judiciary "faults" – apart from those in the period of the "blood-judges" of the communist dictatorship.¹⁶ The rumour was common knowledge that some party officials were not held accountable for ordinary criminal offenses in the socialism, but these cases were mostly "resolved" already in the investigation phase.

¹⁴ Siri Gloppen, *Courts, corruption and judicial independence*, In: Tina Søreide, Aled Williams: Corruption, Grabbing and Development: Real World Challenges, Cheltenham and Northampton (MA), Edward Elgar Publishing, Bergen, 2014, pp. 68-69. "Anti-corruption efforts may jeopardize the independence of the judiciary and thus undermine judges' ability to fulfill their accountability functions. In fact, limiting judicial independence may be the real motive behind such measures. So while we should care about corruption in the court system, we should also keep in mind that corruption charges and measures against judicial corruption may serve as a way to rein in bothersome judges."

¹⁵ Transparency International, *Combating Corruption in Judicial System, Advocacy Toolkit*, Transparency International, Berlin, 2007. pp. 17-25.

¹⁶ László Lengyel, *Esszé a politikai korrupcióról* [Essay of the political corruption], Belügyi Szemle 1998.10. p. 9.

Among the recently uncovered cases, the case was given media coverage when the president of a local (town) court sent his own daughter in his place to judge and the case when a former County Court President accepted bribe for passing a more favourable judgment for the defendant. (The judge was sentenced to 10 years imprisonment without effect.)

3.1. Criminal matters

For almost every person, it is their own freedom that is one of the most precious things, so attempts may take place to bribe the judge so that the accused is not declared to be guilty or that they should get a milder sentence than it would be lawful – writes Mariann Kránitz.¹⁷

In addition, there may be some kind of "request" that the judge declines to adopt certain measures of *coercive measures* – e.g. to terminate a confiscation or sequestration –, as it can be very important in a certain case for an organised criminal group e.g. a high value vehicle used for transporting drugs.

I highlight the decision of *pre-trial detention* as a potential breeding ground for corruption from among the coercive measures. The Hungarian Criminal Procedure Law gives too much room for judicial discretion in respect of the imposition of pre-trial detention, and it is a serious temptation for potential bribers.

3.2. Civil- and economic legal disputes

The transition to capitalism has created a high *retention of pooling assets* both in the case of legal and natural persons, for the keeping of which the parties are obviously willing to sacrifice (e.g. litigation relating to business contracts, compensation disputes).

Processes in which companies with large capital and an extensive *network of connections* are involved may be factors with increased risk.

In particular, *liquidation processes* may pose a danger zone of corruption, as corruption is possible on behalf of the liquidator firms in order to obtain the appointment as a liquidator.

3.3. Protracted lawsuits, regardless of the stage of the trial

One of the biggest problems of judicial systems is the time-dimension of the processes. If courts cannot deliver justice within a reasonable period of time, the justice-seeker might try to use illegal means in order to get a speedier judgment of their cases.

4. Suggestions

In the previous sections we examined how the executive power and the private sector may intervene into the independent and impartial functioning of the judiciary. It is necessary, I think, to make some suggestions as to the prevention and reduction of situations of corruption as well.

¹⁷ Mariann Kránitz, *Korrupció a világban – internacionális korrupció* [Corruption in the world – international corruption], In: Kriminológiai és Kriminalisztikai Évkönyv, XXX.kötet, IKVA, Budapest, 1993. p. 134.

4.1. The judge's moral restraint¹⁸

The most difficult aspect in respect of the selection of *judge candidates* is that they should dispose of a moral strength¹⁹ which is contrary to any temptation to influence the impartiality of the judgment. The courts do conduct so-called career aptitude tests, but this means only the measurement of the health, physical and mental condition of the candidate. We have to admit that we do not have a meter that could test the human moral. We can only conclude to it – *e.g.* upbringing, past performance etc., although it is one of the weakest links in terms of being corruptible.

4.2. The substantive appreciation of judges²⁰

What has been said about the substantive appreciation of judges is to be complemented with the remark that in addition to the office worthy salary, the *valorisation* of the salary is also required.²¹

4.3. „Guarding the Guardians”

As I have suggested in the introduction, the control of judges is an unresolved issue, as it takes the form of *self-control*. The institutional guarantee could be provided if a separate panel with special status could control the judges. These so-called „*screening-judges*” could be the judges controlling the judges.

4.4. Increasing the number of judges

Corruption situations resulting from protracted cases can easily be avoided by the acceleration of adjudication. However, this would mean a significant *increase in the number of judges* – besides the reduction of workload –, because under the current disproportionate workload the number of unresolved cases keep increasing and the quality of judgments deteriorates.

4.5. Mandatory declaration of assets

The Orbán-Government's package of anti-corruption law includes the judges' compulsory declaration of assets. The declaration of assets is a seemingly good legal institution; but it does not work properly in the Hungarian legal practice.

¹⁸ Judit Bellér, *A bíró hatalma és felelőssége a késői -feudális jogtudományban* [The power and the responsibility of the judge in the late feudal legal science] ELTE, 1989, A jogi felelősség – és szankciórendszer elméleti alapjai – p. 4.

¹⁹ Judit Soltész, *A bíráskodás szerepelméleti aspektusai* [The aspects of the role theory of arbitration], Jogtudományi Közlöny, 2002/6, p. 298.

²⁰ Soltész, Op. cit. p. 298.

²¹ Office of Democracy and Governance USAID Program Brief: *Reducing Corruption in the Judiciary*, U.S. Agency for International Development, Washington, D.C. 2009. p. 13. “The judiciary needs adequate and assured financing in order to combat corruption. There are costs associated with attracting good people, providing them with reasonable working conditions, and developing and implementing management systems and educational programs that will further the values and practices of independence, integrity, accountability, and transparency.”

4.6. Judge protection

It is to be considered in connection with the unbiased adjudication by judges if it would be necessary for judges as well to receive protection in cases with special weight in criminal matters as an inalienable right, similarly to the *witness protection* provisions.

4.7. The criteria of becoming a judge

The Hungarian Court Act allows that a judge can not only be a person going through the *hierarchy* of becoming a judge – court clerk then judge appointed for a fixed period –, but practicing lawyers from other areas of legal practice as well. In the case of leading judicial positions, however, – even in the case of a panel chairman – the vacancy for the position of a judge is done in a different way, which precludes external candidates from other *fields of law*, as the prerequisite is a career of several years as a judge, which obviously only few judges can have. It is not conducive for the transformation of the composition of the leaders of the judiciary and thereby for the elimination of possible concentrations.

In the hierarchical *supply of judges* – in my opinion – the selection of court clerks and secretaries does not always happen on the basis of objective criteria, but, unfortunately, the suspicion of *favouritism* arises.

The Anglo-Saxon system, where someone can become a judge after a long-time lawyer's (prosecutor's) practice, can develop a much more innovative judiciary.

5. Concluding thoughts

The best method of defence against criminal corruption is *prevention*. *Corruption* is not to be detected in today's Hungarian judicial adjudication, but the *precautionary principal* is valid here as well.

I think that no branch of power – not even the sentencing power – is to be left without control,²² and if something is appropriate to be taken over from the American model of law, it is nothing else than the principle of "brakes and balances".

According to a well-known – already deceased – lawyer from Budapest: There can be no doubt that one of the most important requisites of good adjudication (administration of justice) is a scientist judiciary. The judges' profession is definitely the first and most important profession in a state. Whoever fills in this position that should be the first man in honesty, he/she should know the law but also know life as well ... And he/she should have a tried and tempered character, someone who wants to keep the law steadfastly midst evil, the temptations of life and its enticements.

²² László Korinek, *A korrupció néhány kriminológiai vonatkozása* [A few criminological aspects of corruption] – Korunk 1993/7. p. 35.