ABSTRACTS

ESSAYS

In his essay Károly Bárd examines the way judicial independence asserts itself in the candidate countries of the European Union; the legal environment granting judicial independence, and other factors affecting judicial independence in either a positive, or in a negative way. Judicial independence is indisputably an essential precondition of legal statehood, says Bárd, and this is why it becomes understandable if the European Commission also evaluates the extent of the independence of judges and courts, when evaluating the achievements of countries aiming at membership of the European Union. Reports on countries striving for affiliation mention more the clumsiness of the realisation of judicial decisions, and the low effectiveness of judicial courts. Effectiveness, however, means not only the speed of decision settlement, but also the good quality of decisions. When evaluating the quality of judicial decisions the basic aspect is that of predictability. A decision is predictable only if the judge concentrates exclusively on facts that directly concern the case, and which are judicially relevant, not giving in to any kind of political or economical influence. The precondition of an effective proceeding is thus the independence and impartiality of the judge.

In his writing Péter Hack takes a look at the guarantees of the independence of the judiciary. However, in his opinion no catalogue of enacted institutional guarantees, however impressive, can substitute for the public confidence which creates the legitimacy of jurisdiction. If the public does not take courts to be independent and impartial, then citizens will not seek remedy for their problems in them, but will try to do so in non-political and non-judicial ways. This threat is especially great in those countries, where the traditions of independent jurisdiction do not or hardly exist. According to the author, Hungary is such a country.

Zoltán Fleck examines the effectiveness of judicial independence from the judicial-sociological aspect, and draws attention to the fact, that more than a decade after the political transition the social support of democratic institutions, and so of courts is still not sufficient. To put it in a sarcastic way: this is the case of a democracy without democrats. According to Fleck, the practice of the institutions established by the Constitution, and the dedication of the political élite to democratic principles could promote the stronger social support of the culture of the rule of law. The operators of political and legal institutions are at the same time both the formers and the victims of inherited cultural and mental states. A legal decision, for example, made in a delicate case of power-relations, which is independent, autonomous and legally perfect, can contribute to the development of political culture.

INTERVIEW

In jurisprudence appearances are the essence, formulates itself in the interview of Gergely Fahidi with Zoltán Lomnici, deputy head of the Supreme Court, and with Péter Bárándy, secretary-general of the Budapest Bar Association. Reacting on a recent statement which drew attention to the independence of jurisprudence being in danger, Lomniczi emphasised that the institutional-personal guarantees of judicial independence are granted. However, it could seem disquieting that there appears to be a great gap between the budget suggested by the National Council of the Judiciary, and that accepted by Parliament. The General Accounting Office has said, that the budget of the National Council of the Judiciary is the reasonable one. In Lomniczi's opinion this is a disturbing factor, however, it is not a reason for

courts and judges not to make decisions independently and impartially. There are no phone-calls or pressure put on them. Péter Bárándy noted that he meant pressure exercised through certain messages sent. He put the question to us, if the Minister of Justice, the Head of the Prosecution, the president, or the head of Parliament can appear disobedient to judicial decisions, and if they can create a list of wishes, concerning the speed and nature of such decisions. Zoltán Lomniczi agrees, that we have to pay attention to negative tendencies, and have to talk about the dangers, but if we want to give a true picture, we also have to tell that the National Council of the Judiciary as a self-governing body can give a much wider independence to this power than in many other European countries. In his opinion we can be proud of the system of guarantees in general. In the attorney's opinion such strong legal guarantees are needed for the very reason that in lack of impassable democratic social norms the threat to judicial independence can also be greater than in old, settled democracies. In the same way, instead of debates surrounding the budget, an annual and automatic increase of courts' finance would be reasonable. He said he hoped, that in twenty years the drawing up of the budget will be given back to the Minister of Justice, and then no such debates will be understood anymore.

FORUM

How do you see judicial independence, and what can mean a threat to the impartiality of jurisprudence and to decisions made under no pressure? These are the questions we asked many experts of theory and practice. In his writing Balázs Tóth states, that more than ten years after the political transition the concept of judiciary independence has become a category which is "politically correct". He assumes, that although the constitutional provisions, and the laws on the judiciary of 1997 have created the basis for judicial independence, the impartial decision-making of judges presupposes a mental state – sometimes courage – which has to be created primarily by the judge making the decision. Daisy Kiss and Erzsébet Kadlót examine the Hungarian environment in the lights of two international treaties. In Daisy Kiss' opinion the main problem is that the respect for the judicial profession is gone, or is declining quickly. The partakers in power, and also most of the judges do not have a high enough respect for the work of judges; they do not sense that being a judge is not only a job, but a lifestyle. A judge is a dedicated, intellectual user of the law, with a civil function, who is impartial, unapproachable, and who knows it well, that these characteristics protect the reputation of jurisdiction. Erzsébet Kadlót emphasises, that for the undiminished effectiveness of the value of judicial independence the inbuilding of weighed guarantees into the legal system is needed, protecting this principle. These have to provide efficient ways of protecting independence even in those cases when the subsystems of either other powers, or those of interior self-government endanger independence by their formally not disputable functioning, yet in reality resulting in an essential influence. In József Kárpáti's opinion it primarily depends on the current personalities of public political life, whether they tolerate judicial power becoming independent as a result of reforms, or the system of justice falls under the influence of other powers or groups through personal, financial or political effects. He presumes, that a fair, independent and strong jurisprudence is not in the interest of all layers of society and power. Endre Bócz gives voice to his opinion that the quality of political culture is the factor on which it depends whether a situation can occur, when the – compared to other budgetary branches – relative, supposed or real relationship between the practised independence of jurisprudence and its financial supply can be the basis for a charge. He also mentions the possibility of such a charge – however unfounded it may be – shaking public faith in jurisprudence to its foundations. From the analysis of the Hungarian situation András Hanák

draws the conclusion that the court can defend its own independence only if – in part with a more active behaviour in basic law-judiciary – it also becomes a real power, which can function as checks and balances. A judiciary system which does not consider it compulsory to protect fundamental rights against all organisations of the state, in spite of its direct constitutional authority, can hardly protect its own independence, if in legislation and public administration it is not the white knights of legal statehood who appear active.

DOCUMENTS AND COMMENTARIES

This column deals with the decisions brought by the Constitutional Court on free speech, privacy and the freedom of assembly. In his essay Gábor Halmai thoroughly evaluates the decisions on fundamental rights, made in recent months, and incorporating them in the twelve year-tradition of the Constitutional Court he draws the conclusion that the body has regressed in its basic rights judgement of political rights. Halmai's essay lays stress on the decision of December, declaring the right of reply fundamentally constitutional.

Analysing the passages of the Constitution dealing with compulsory military service Tamás Csapody points out the weak points of the decision made by the Constitutional Court last autumn. With reference to the lex Répássy provision, and searching for the legal political reasons of the right of reply Gábor Polyák points out, that the legislator's motive was not that of a more highlighted protection of personal rights, but the wish to extend the "fairness doctrine", the demand of balanced information in the electronic media onto the whole of the media. Presenting the Hungarian and German practice of constitutional rights as opposed to the provision judging the propositions stating the violation of the freedom of assembly, István Szikinger gives voice to his serious criticism.

PRIOR TO DECISION

In this column Máté Szabó writes about the constitutional questions surrounding the clause of the oath public servants have to take. Following the modification of the Act on the Legal Status of Civil Servants, from July 2001, the oath can be extended by the clause "So help me God!", according to the conviction of the juror. The ombudsman has already taken a stand on whether the practice of the law can give rise to constitutional worries; however, the case is to be continued before the Constitutional Court. Máté Szabó elaborates on the question whether the particular part of the law can be viewed as one violating the freedom of conscious and religion, or else as violating the right to personal data.

AFTER DECISION

In this column we introduce two decisions made by the Constitutional Court last year. The first decision examined the constitutionality of the establishment of one Regional Court of Appeal. In this decision the corporate body declared, that the courts of appeal cannot be substituted by one Regional Court of Appeal by the legislative. The second decision examined the constitutionality of a part of the legal measure concerning the regulations of courts, and by this the question if the fact violates judicial independence that up to this day a ministerial order regulates the functioning of courts.

PROTECTORS OF RIGHTS

In their writing Sándor Loss and his co-authors sum up the experiences of a research which made an effort to ascertain that the decisions made by courts differ if the accused person is a gipsy and if he or she is not. The research has identified several factors which render it probable that a discriminatory treatment exists between gipsy and non-gipsy defendants. The authors admit that the number of elements of the research does not make it possible to draw exact conclusions, yet it outlines trends and substantiates the necessity of a wider, more representative research. The authors also give account of the fact that the rules currently in force do not make it easier to carry out a really thorough and authentic research, the leaders of different courts having a different view of the possibilities of examining the files of the cases.

REVIEW

In this column we introduce four books published recently: *Jurisdiction in the State-socialism*, by Zoltán Fleck, *International Human Rights* by Thomas Buergenthal; *Natural Law* by János Frivaldszky; and *The Changes of Feminism* by Catharine MacKinnon.