

# Judicial Ethics in Europe

## Good judicial practice - Principles and Issues

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For the last five years, together with a group of nine colleague judges appointed by the Swedish Association of Judges, I have been working with the question of adopting a set of ethical rules or guidelines for Swedish judges. In this work we cooperated with an analyst –the former president of Svea Court of Appeal Johan Hirschfeldt who also provided us with a secretary. In my speech today I will recapitulate some of the questions we asked ourselves during this process and also tell you about some of the answers we found to these questions.

### *Is there a special Judicial Ethics for Judges?*

One could think that the first question should be: *Why should you try to draft a set of ethical rules or guidelines for judges?* That was in fact the second question we asked ourselves. We started one step earlier and asked: *Is there a special Judicial Ethics for Judges?* The answer to this question is not as obvious as you might think. The word “ethics” itself is multifaceted. A wide definition could be “The basic concepts and fundamental principles of decent human conduct.” Of course judges should be guided by the same set of moral principles as other citizens and most people think that judges, because of the nature of our work should have a higher – not different – morale than other people. It could be argued that by setting up a special set of ethical rules, applicable only on judges, the judges form a guild, screened from the rest of the society.

Judicial ethics has nothing much to do with ethics in the sense of “the basic concepts and fundamental principles of decent human conduct” though it should of course not be in contradiction of these principles. Judicial Ethics to us are rules or standards governing the conduct of judges as members of the judiciary. It is the professional ethics of judges, dealing with how a good judge should act in different situations or dealing with different questions while performing his or her duties as judge. In Sweden, like in most other civilized countries, these standards have existed within the judiciary for centuries, but not always in an explicit, formulated or written form. Young judges have learned from the older ones. Questions of judicial conduct in different situations have been discussed between judges during lunch or coffee breaks. How far can I go as a judge, explaining the content of law to one of the parties, without appearing to be biased? In court rooms during deliberations. Should the chairman of the court have interfered and stopped the plaintiff from telling her life’s story during the hearing, or was it important that she got the chance to speak to the point without being interrupted? In media when a journalist has found out that the judge handling a case of football hooliganism since many years has belonged to the supporter club of the same team as the hooligan. Does this make the judge disqualified? And so on. The answers to these difficult questions are in my opinion parts of the Judicial Ethics for judges that we all have learned, working as legal clerks, assistant judges and associate judges in the court before being appointed permanent judges.

Now for the second question.

### Why draft a set of written ethical rules or guidelines for judges?

Some common answers to this question are:

- a. The rules/guidelines shows the citizens that judges are aware of the ethical questions connected to their profession and shows the standards the judges themselves has set up as a goal.
- b. The rules/guidelines are useful for the individual judges themselves to find solutions in when confronted with an ethical problem.
- c. The rules/guidelines can be used on seminars and discussions on judicial ethics and in further education of judges.
- d. The rules/guidelines can serve as rules or standards for authorities that supervise courts and judges or for a governmental disciplinary board when deciding if judges have behaved “unethical”.
- e. The rules/guidelines are needed for Sweden to follow the Recommendation CM/Rec(2010)12 by the Committee of Ministers of the Council of Europe on the independence, efficiency and responsibilities of judges.
- f. Every profession with any self-respect such as lawyers, real estate agents, masseurs and homeopaths as well as judges should adopt a set of ethical guidelines to be looked on as a serious profession.

All answers (except for the last one) can be good reasons for adopting written ethical rules or guidelines. The purpose of the rules or guidelines also has big influence on how they should be drafted. In my opinion the use or purpose of such ethical rules or guidelines highly depends on national conditions. To explain why we finally decided not to adopt a set of ethical rules but instead a number of questions it’s necessary to know a few things about the Swedish judiciary and its history.

### Olaus Petri Domarregler

More as a curiosity you might be interested to know that written ethical rules or guidelines for judges are something that has existed for several hundred years in Sweden. Around year 1540 a Swedish scholar and clergyman named Olaus Petri (1493-1552) formulated “Rules for the Judge” (Domarreglerna). These rules are still printed in the Swedish Law Book and many of them feel quite modern despite their old age. Some examples:

*“A good and clever judge is better than good law, since he may settle the issue to match what is equitable; but if the judge is evil and wicked, there is no use even of good law, since he will bend and twist it as he likes.”*

*“All laws need to be applied with good reason, since the greatest justice can be the greatest injustice, and there must be an element of charity in law as well.”*

*“The benefit for common people is the best law, and therefore, what proves to be for common benefit shall be the law, even if written law seems to order otherwise.”<sup>1</sup>*

### A first try in 1995

In 1995 the board of the Swedish Association of Judges, I think inspired by colleagues from Austria and United Kingdom, worked out a set of ethical rules for judges and asked the members of the association if they thought that the organization should continue to work on a project with the goal to adopt a set of rules. The members did react and the reaction was not very positive. A majority of the judges found it unnecessary with ethical rules for judges and said no to the proposal.

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<sup>1</sup> Translation by Raimo Siltala in “Law, Truth, and Reason: A Treatise on Legal Argumentation”, Springer; 2011 ed.

Some of the main arguments against the proposal were that it would only give the public the impression that Swedish judges acted unethical, as they themselves thought that a set of ethical rules was needed. It was also argued that ethical rules either had to be very precise or casuistic to fill the purpose (or risk) of being used by for example media, JO, JK or the National Disciplinary Offence Board or had to be very general in their wording (“a judge should always act so that the public confidence in the judiciary is not harmed” or “a judge should not commit crimes”) and therefore not useful for anyone. Some judges thought that we already have the rules written by Olaus Petri in 1540 and this was more than enough.

Some Swedish judges also feel that their ethical behavior already was regulated and supervised in many ways. First of all a lot of the procedural laws and regulations that a judge has to follow has to do with the judicial behavior in the court. For example the Procedural Act contains rules on disqualification of judges. If a Swedish judge commits professional misconduct he or she can be prosecuted for this by a general prosecutor or by a part. Swedish judges have no immunity against civil or criminal claims. In the nineties we had just gotten a new legislation about professional misconduct and it was a general opinion among the Swedish judges that written binding ethical rules might be used against the judges.

The Parliamentary Ombudsmen (JO), on behalf of the Swedish Riksdag, and the Chancellor of Justice (JK), on behalf of the Government, supervise courts and judges in order to ensure that they comply with laws and statutes and fulfill their obligations in all other respects. Also matters of judicial conduct are supervised by these authorities. The Chancellor of Justice also examines claims for damages directed at the state, for example damages due to violation of the right to justice within a reasonable time.

The Parliamentary Ombudsmen and the Chancellor of Justice respond to complaints from the public, but can also initiate their own investigations. Neither the Parliamentary Ombudsmen nor the Chancellor of Justice can review or modify the decisions of a court. The authorities may give recommendations and critical advisory comments, for example regarding the obligation to handle cases without undue delay or the behavior of a judge. They also have the right to initiate disciplinary procedures against judges for misdemeanors. The National Disciplinary Offence Board decides in questions regarding disciplinary sanctions.

The proposal from the board of the Swedish Association of Judges was withdrawn.

### *The continuing process*

Time goes by and in 2006 many (not all) of the Swedish judges had a different view on the necessity to have a living discussion among judges about certain ethical issues. Examples of some of the items discussed were the attitude judges had towards the public, if we wrote judgments that the parties understood and how younger judges were treated by senior colleagues. The Judges Association together with the National Board of Court Administration arranged seminars and initiated discussions about ethical subjects.

Around this time (in November 2007), in our neighboring country Norway, a legislative committee published a draft proposal on ethical rules for Norwegian Judges. The reason for the Norwegian proposal was that they some years earlier had introduced a National Disciplinary Offence Board similar to what we had had in Sweden for many years. The Norwegian board should decide whether judges that were reported to the board had broken what was called “good judicial practice”. The members of the board soon found out that there was little or no practice in Norway on how this term should be understood and asked the government for regulations on this subject. The government asked the Court Administration to appoint a commission that later proposed a regulation on ethical rules for Norwegian Judges that should be adopted by the government. The proposal contained 35 articles in nine chapters together with commentaries and filled over 100 pages.

The proposed regulation was very detailed. One chapter was about the “behavior of judges in the courtroom” and in art. 17 it says that *“The behavior of the judge should show that the court is impartial and independent. Everyone that enters the court should be treated with kindness and respect. The judge should always be mindful of parties with special needs. As chairperson in the court the judge should ensure that the non-professional actors understand the proceedings. The judge must use a language that is clear and easy to understand. ... The judge is to be well prepared when he or she comes to the courtroom. As chairperson the judge must control the proceedings so that they are concentrated on what is important in the case. The judge must show respect for the need of the parties to have enough time to prepare them... “*

Chapter four was about the relation to lawyers and prosecutors, chapter five on the relation to media, chapter seven on the relation to colleagues and chapter eight on behavior outside the court. In all of these chapters there was an article stating that a judge should be polite and correct towards lawyers/prosecutors/representatives of media/colleagues.

The proposed rules were heavily criticized. The ethical rules were too detailed and they covered issues that already were covered by other laws. The reaction did not stay in Norway but found its way over “fjällen” to Sweden. You could say that the proposal from the Norwegian committee was exactly the type of ethical rules that some Swedish judges did not want and had feared. The proposal was criticized not only because of its content (Personally, I find a lot of the proposed rules good) but also because of the way they were prepared. Ethical rules for judges should not be imposed on the judges from the government, they must be entrenched in the judiciary and should be prepared by the judges themselves.

The Norwegian proposal was withdrawn. Now, a set of 13 ethical rules have been adopted by the Norwegian Association of judges.

#### *The Swedish publications on Good judicial practice*

Having followed the discussions in Norway and also participated in the discussions in the European and International Associations of Judges, we decided in 2009 that it was a good idea to take the initiative to try to draft a set of ethical rules or guidelines for Swedish judges. We formed a working party consisting of nine judges and started without any preconceptions about the final result. Through the National Board of Court Administration, we got tremendous help by former court of appeal president Johan Hirshfeldt and an associate judge, Camilla Gensmann, who worked full time as our secretary. We studied all the rules on judicial ethics and all the rules on judicial behavior we could find. We studied the practice of The Parliamentary Ombudsmen, the Chancellor of Justice and the National Disciplinary Offence Board. We had and had long and interesting discussions on the purpose of the different regulations and guidelines we studied.

After about a year we decided that in Sweden we didn’t need a set of ethical rules for judges. The main reasons for this decision was that

- a. It is very difficult to draft a set of rules so precise that they give any guidance in a special case without making them very long and detailed.
- b. Rules that are put in general terms often become so bland that they become meaningless obviousness’s.
- c. The important thing was that it created the conditions for a living and ongoing discussion among judges about the ethical aspects of our work. A set of rules risked creating converse. End of discussion, here are the ethical rules, follow them!

Instead of drafting ethical rules or guidelines we decided to list a number of ethical questions. We gave no answers to the questions. One of the sources that inspired the idea of asking questions is the German document “Säulen richterlichen Handelns” (2007). This document was published by Schleswiger Ethikrunde, a group of judges from the German state of Schleswig Holstein who work with judicial ethics.

To formulate and systemize the questions we decided to ask the Swedish judges what ethical problems they had encountered in the last years and tried to fit the questions in under four of the Bangalore principles; independence, impartiality and equal treatment, good conduct and treatment of others and good expertise and efficiency. Some of us participated in a large amount of seminars and meetings with judges where we discussed different aspects of Judicial Ethics. We used a form where we also made difference between in which of three different roles the ethical problem had occurred, the judge as a judge in court, the judge as a lawyer outside court, for example working in a legislative commission or as chairman of an arbitration panel, and finally the judge as a private person, for example as member of the parents Association on her daughters school or as buyer of a house.

You can see some of the result of our work in the enclosed “sort version” of “Good judicial practice – Principles and Issues” that has been translated into English by the Swedish court administration.