

# Do Lawyers Need Codes of Ethics? A case study from the Czech Republic

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**Do Lawyers Need Codes of Ethics? A case study from the Czech Republic.** The aim of the present paper is to examine the importance of codes of ethics for legal professions. Such documents may be a unifying factor in professional practice. Hence, numerous relevant arguments in favour of and against codes of ethics are presented, alongside the distinction between principle-based and rule-based approaches.

In the second part, the situation in the Czech Republic is analysed in detail, with special focus on how the codes are treated in the practice of the professions. The analysis leads to a common conclusion, which may be the most important point surrounding codes of ethics, even if it is somewhat banal. That is, to ascertain whether a code of ethics benefits the profession, it is not sufficient to think about it in general categories; instead, we must examine the content and overall status of each specific code and to observe more closely the practice of its usage.

**Keywords:** *code of ethics, lawyer, judge, prosecuting attorney, Czech Republic*

## The popularity of codes of ethics

Two hundred and twenty-nine million. This is the number of hits displayed by Google in a search for the term ‘code of ethics’.<sup>1</sup> Such a number shows that it is a truly popular *term*, and a quick look at the content of individual hits may lead us to believe that it is also an extremely popular *institution*. There are codes of ethics for the American Pharmacists Association, for the public officers of the Republic of Mauritius, for the Community Learning and Development Standards Council in Scotland, and for the members of an association promoting the responsible breeding and welfare of purebred dogs (DOGSNSW, Australia).

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<sup>1</sup> The variant ‘ethical code’ garnered 186 000 000 million hits. However, we could have searched for other names used for documents of a similar type, such as ‘code of (professional) conduct’, etc. For the purposes of this text I consider ‘code of ethics’ an overarching term referring to the mentioned and similar variants of the documents.

This raises the question: Do we need codes of ethics? And do lawyers need codes of ethics? Judging by how frequently codes of ethics are used, it would seem they definitely do. If a company that sells cannabinoids has a *Code of Business Conduct & Ethics*, it is hard to imagine a world in which attorneys, judges and prosecutors do not have their own.<sup>2</sup> The situation becomes more complex when we consider individual codes of ethics in more detail. The distinguishing features among various codes of ethics are numerous. Some codes are binding and others are not. (The binding codes may be effectively or ineffectively enforced.<sup>3</sup>) There are extensive and concise codes, general and detailed codes, influential and ineffective codes. In some cases, the code of ethics is just a label behind which to hide commercial or other interests; in others it resembles a tombstone under which an annoying topic rests in peace. Of course, there are also reasoned opinions claiming that we can easily live without codes of ethics.

In short, in the case of codes of ethics, the old adage applies that the devil is in the details. Therefore, a relatively simple question concerning the need for codes of ethics requires a more complex, structured answer.

In this text I explain why I believe lawyers today need codes of ethics. I also argue what content the code should contain and how it should be applied in legal practice. First, I present arguments in favour and against codes of ethics. Next, I address whether codes of ethics should consist of provisions of principle or rather regulatory provisions. The last chapter before the conclusion provides a brief introduction to professional codes in the Czech Republic. As such, the order of the chapters follows a simple logical progression from general issues to specific ones.

The text primarily uses sources involving attorneys-at-law, who typically attract more attention than other legal professionals in terms of ethical behaviour. Nonetheless, my arguments relate to legal professions in general, although Chapter 3 is more specific. For the benefit of readers, I have exclusively used those theses and arguments that I consider applicable to the legal profession in general. (The paper deals mainly with judges, prosecuting attorneys and attorneys-at-law. Of course, individual professions have their specific features, but I believe that the general conclusions of the text are applicable across legal professions.) Conversely, theses and arguments from my sources that are only applicable to one of the legal professions have been left out or only briefly mentioned.

I use the term ‘codes of ethics’, although it may be more precise to write about codes of morality. Given that ethics is the science of morality, the term ‘code of ethics’ seems inappropriate in this context. Consider a simple ‘translation’ of the term: ‘code of the science of morality’ does sound somewhat strange. Nonetheless I use the term ‘code of ethics’ because it has traditionally been used and thus become a generally comprehensible term.<sup>4</sup>

<sup>2</sup> A joint Google search for ‘code of ethics’ ‘lawyer’ gives approximately 77,400,000 hits.

<sup>3</sup> Here is one older example. In 1984 in California, a total of 8,329 complaints were filed for breach of duties of an attorney-at-law, but only 163 ended with a disciplining of the attorney. DE GROOT-VAN LEEUWEN, L. E.: Polishing the Bar: The Legal Ethics Code and Disciplinary System of the Netherlands, and a Comparison with the United States. *International Journal of the Legal Profession*, Vol. 4, No. 1-2, 1997, p. 19.

<sup>4</sup> Cf. NICOLSON, D., WEBB, J.: *Professional Legal Ethics*. New York: Oxford University Press, 1999, pp. 4-5.

For the purposes of this text, I consider a code of ethics to be a *'formal statement of standards which the professional consults to guide his or her behaviour. It represents a statement of the roles professionals ought to assume in specific situations. To that extent, a code is a formalized statement of role morality, a unitary professional "conscience"'*<sup>5</sup>.

## 1. Codes of ethics – *raison d'être* a criticism

Codes of ethics are a relatively new phenomenon in legal professions, although this does not necessarily mean that lawyers had no interest in ethics in the past, genuine or just declared. Their interest simply had a different form. Typically it involved oaths, legal rules communicated in various forms,<sup>6</sup> or recommendations and advice received from more experienced colleagues.<sup>7</sup> Over time, various codes have become an increasingly frequent fixture of legal practice.<sup>8</sup> Why is this? And what are the arguments against the institutionalisation of morality in codes of ethics? The answers to these questions are offered in this chapter.

### 1.1 Arguments in favour of codes of ethics

First, codes of ethics have an educational function. They are, or at least can be, a record of the moral principles, rules, values and ideas of a given profession.<sup>9</sup> In particular, the code of ethics gives candidates a notion of the traditions of their profession and their professional responsibility.<sup>10</sup> Additionally, a code of ethics can be used in formalised education organised by professional chambers, as well as in individual study.<sup>11</sup> Put briefly, codes of ethics are an easily accessible way to share information about the moral requirements of a profession.

Codes of ethics contribute to the discourse on ethics by focusing attention on selected moral topics. This role becomes most perceptible when a new code is drafted or an existing code is amended. Such processes require a comprehensive assessment of current

<sup>5</sup> LODER, R. E.: Tighter Rules of Professional Conduct: Saltwater for Thirst? *Georgetown Journal of Ethics*, Vol. 1, No. 2, 1987, p. 318.

<sup>6</sup> CHAFEE, E. C.: Death and Rebirth of Codes of Legal Ethics: How Neuroscientific Evidence of Intuition and Emotion in Moral Decision Making Should Impact the Regulation of the Practice of Law. *The Georgetown Journal of Legal Ethics*, No. 2, 2015, p. 328.

<sup>7</sup> WILKINSON, M. A., WALKER, Ch., MERCES, P.: Do Codes of Ethics Actually Shape Legal Practice? *McGill Law Journal*, Vol. 45, No. 3, 2000, p. 647.

<sup>8</sup> Taking the US as an example, the first complex code was adopted by the Alabama bar association in 1887. CHAFEE, E. C.: Death and Rebirth of Codes of Legal Ethics: How Neuroscientific Evidence of Intuition and Emotion in Moral Decision Making Should Impact the Regulation of the Practice of Law. p. 330. Similarly, a Slovak author who deals with the ethics of the legal profession in the long term, Alexandra Krsková, stated that codes as sources of rules originated in the 20<sup>th</sup> century. KRSKOVÁ, A.: *Etika právnického povolania*. [Ethics of the Legal Profession] Bratislava: Vydavateľské oddelenie Právnickej fakulty Univerzity Komenského, 1994, p. 31 et seq.

<sup>9</sup> NICOLSON, D.: Mapping Professional Legal Ethics. *Legal Ethics*, No. 1, 1998, pp. 52-53.

<sup>10</sup> KRSKOVÁ, A.: *Etika právnického povolania*. p. 31.

<sup>11</sup> NICOLSON, D.: Mapping Professional Legal Ethics. p. 53.

issues. As such, individuals who are informed about the debate must be involved.<sup>12</sup> Moreover, the wording of codes of ethics is usually used in academic explorations of the ethics of the legal profession,<sup>13</sup> as well as in the public consideration of specific cases.

Codes of ethics also have a regulatory function,<sup>14</sup> which is clear in the case of formally enforceable codes of ethics,<sup>15</sup> but can also be seen in other instances. Even codes that have no disciplinary character can impact professional conduct; for professionals, such codes are an expression of professional ‘conscience’ on the personal level and an instrument of informal pressure from colleagues on the social level.<sup>16</sup>

Public commitment to codes of ethics may justify the trust which the legal profession warrants from the public. Via such codes, the profession commits to values and ideas, and imposes on itself high or increased expectations.<sup>17</sup> On the other hand, the public could use codes of ethics for oversight of the profession and criticism of professional practice.<sup>18</sup>

Finally, codes of ethics may be desirable because the notion of what it means to be a good lawyer, attorney, judge etc. is fragmented, particularly in a dynamically changing world with a prevailing trend of openness to different opinions and attitudes. Codes of ethics therefore represent an indispensable unifying element.<sup>19</sup>

## 1.2 Arguments against codes of ethics

There are many objections we may raise against codes of ethics. A principle-based objection challenges the existence of codes of ethics *per se*. If decisions are to be made by free moral actors,<sup>20</sup> then codes of ethics represent a useless set of externally prescribed rules, because adherence to an external rule does not constitute moral action.<sup>21</sup>

<sup>12</sup> JOHNSON, V. R.: The Virtues and Limits of Codes in Legal Ethics. *Notre Dame Journal of Law, Ethics & Public Policy*, No. 1, 2000, pp. 36-37.

<sup>13</sup> NICOLSON, D.: Mapping Professional Legal Ethics, p. 53.

<sup>14</sup> BOON, A.: The Legal Professions' New Handbooks: Narratives, Standards and Values. *Legal Ethics*, No. 2, 2016, p. 207.

<sup>15</sup> Alexandra Krsková simply stated that a formally enforceable ‘control system would help to exclude from the profession those who have never belonged to the profession morally or failed’. KRSKOVÁ, A.: *Etika právnického povolania*, p. 31.

<sup>16</sup> MOORE, N. J.: Lawyer Ethics Code Drafting in the Twenty-first Century. *Hofstra Law Review*, No. 3, 2002, p. 924.

<sup>17</sup> At the same time it may attenuate the expectations of the public that may be exaggerated. KRSKOVÁ, A.: *Etika právnického povolania*, p. 31.

<sup>18</sup> NICOLSON, D.: Mapping Professional Legal Ethics, pp. 52-53.

<sup>19</sup> For a more detailed description of the fragmentation of traditional notions of legal practice, see BARON, P., CORBIN, L.: The Unprofessional Professional: Do Lawyers Need Rules? *Legal Ethics*, No. 2, 2017, p. 167.

<sup>20</sup> Cf. ANZENBACHER, A.: *Úvod do etiky*. [Introduction to Ethics] Praha: Zvon, 1994, p. 14. Anzenbacher applied a certain minimum quality of the person acting when assessing the morality of an act. Specifically, the person acting must be aware of the distinction between good and evil, although the opinions of people may differ in specific cases; they must also be aware that one should do good and not evil; that is, the commitment to do good should be unconditional. Such abilities of an individual are referred to as conscience.

<sup>21</sup> WILKINSON, M. A., WALKER, Ch., MERCES, P.: Do Codes of Ethics Actually Shape Legal Practice? pp. 648-649.

In a similar spirit, another argument states that morality cannot be legally or formally represented: '*Ethics... are not something that can be legislated, but are something an individual either has or does not have*'.<sup>22</sup> The first part of this quotation indicates that institutionalising moral rules tends to narrow down and simplify those rules. Incorporating moral rules into a code of ethics deprives the rules of their moral nature, and they become legal or quasi-legal rules. This brings about an unacceptable reduction of their content.<sup>23</sup> The second part of the quotation casts doubt on the importance of pre-existing texts for moral actors. Individuals formulate their impressions of moral processes from sources other than texts, such as from the wording of professional oaths, from older colleagues etc.

Another source of criticism is the lack of trust in the profession, or in professional associations as a whole. In particular, if a profession is subject to self-regulation or has significant influence on the regulation applied to it, a situation can arise in which the wolf is set to mind the sheep. The conflict of interest between a profession and the public may lead to the introduction of rules that serve to protect the profession rather than impose relevant requirements on the professional.<sup>24</sup> Even when rules are introduced in good faith, they may come across as simple compromises rather than noble aspirations. When codes of ethics are being formed, the requirements and demands of lobbying factions within each profession, each with their own interests, must be taken into account.<sup>25</sup> Relatedly, the adoption of a code does not necessarily mean that a profession is making an effort to limit itself and set ambitious goals, it may simply be a façade—a political act undertaken when the profession is beginning to lose public trust.<sup>26</sup> In self-regulating professions, there is often concern over class bias, whereby a group of regulating persons sets the rules to suit their own interests, failing to take into account and perhaps even violating the interests of other members of the profession.<sup>27</sup>

Some authors go even further in their criticism, asserting that codes of ethics have an adverse effect on the quality of moral thinking because they prevent the moral development of an individual. If a code sets the minimum standard (or the above-mentioned compromise), adherence to such a code produces moral mediocrity at best.<sup>28</sup>

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<sup>22</sup> *Ibidem*, p. 649.

<sup>23</sup> SKUCZYŃSKI, P.: *The Status of Legal Ethics*. Frankfurt am Main: Peter Lang GmbH, 2013, pp. 100-101.

<sup>24</sup> Importantly, enforceable professional rules can be abused to the detriment of specific interest groups. This may be a threat particularly when the rules are set and enforced by the profession itself. HARRIS, N. G. E.: Professional Codes and Kantian Duties. In CHADWICK, R. F. (ed.): *Ethics and the Professions*. Brookfield, USA: Avebury, 1994, p. 112.

<sup>25</sup> JOHNSON, V. R.: The Virtues and Limits of Codes in Legal Ethics. *Notre Dame Journal of Law, Ethics & Public Policy*, No. 1, 2000, pp. 45-46.

<sup>26</sup> WILKINSON, M. A., WALKER, Ch., MERCES, P.: Do Codes of Ethics Actually Shape Legal Practice?, p. 649.

<sup>27</sup> *Ibidem*, a model example of the abuse of regulatory powers based on race rather than on class is the rule applicable during South African apartheid requiring practicing lawyers to speak Latin, which was not taught to non-white citizens. ABEL, R. L.: Lawyers' Self-regulation and the Public Interest: a Reflection. *Legal Ethics*, No. 1, 2017, p. 116.

<sup>28</sup> Alexandra Krsková writes that codes of ethics '...assist in avoiding evil, but not in doing good'. KRSKOVÁ, A.: *Etika právnického povolania*. p. 31.

In this way, moral decision-making using a code of ethics may hinder actual morality: instead of basing a decision on personal moral deliberation and acceptance of personal moral responsibility, an actor may apply regulations in a mechanical manner.<sup>29</sup>

The overviews provided in 1.1 and 1.2 are not exhaustive, but rather basic outlines, and different authors may vary in their classification of the reasons given for and against codes of ethics. For example, Vincent Johnson<sup>30</sup> mentioned the educational and aspirational functions of codes under their so-called declaratory function. Similarly, Nancy Moore<sup>31</sup> claimed that codes of ethics serve to gain the public's trust and that they reflect the responsibility of a profession towards the public. She referred to these aspects as the ideological function of the codes. I disregard these nuances because the purpose of this text is not to relay similar content from multiple authors, but rather to present the basic content itself.

### ***1.3 To have or not to have a code of ethics – an interim summary***

As already stated in the introduction, I believe that legal professions should have their own codes of ethics, although I have some reservations. In my opinion, the arguments presented above in favour of codes of ethics are convincing, as are several criticisms of the arguments against codes of ethics. Below is a brief overview of such criticisms.

I agree that true moral decision-making can only be accomplished by a free individual. However, in my opinion, codes of ethics may contribute to such decision-making. It is misguided to imagine moral decision-making as a hermetic, internal, private process. Although individuals are entitled to assume that an action that accords with their conscience is morally correct, others may consider the same action morally wrong or indifferent based on their own conscience. This conflict reveals the dialectics of conscience: individuals act based on a conviction of the general moral correctness of their actions, but such convictions are necessarily subjective. Uncertainty caused by moral conflicts with other individuals necessitates discourse, in which interlocutors seek acknowledgement of their subjective opinions as generally valid.<sup>32</sup>

In the situation described, a code of ethics may play at least one beneficial role: that of the other individual. Although the decision-making supremacy of the free individual remains, the code of ethics may serve as an invitation to a dialogue and a more thorough consideration of one's own positions, particularly when the conclusions of the individual conflict with those of the code. On the other hand, the code may concord with the conclusions of the individual. This illustrates the role of codes as the 'conscience of the profession'. Individuals should be regulated by the code only because the norms of the code are convincing and after moral deliberation. As such, the individual should always have the final say in moral decision-making. In my opinion, this applies to both formally

<sup>29</sup> WILKINSON, M. A., WALKER, Ch., MERCES, P.: Do Codes of Ethics Actually Shape Legal Practice? pp. 650-651.

<sup>30</sup> JOHNSON, V. R.: The Virtues and Limits of Codes in Legal Ethics. pp. 38-39.

<sup>31</sup> MOORE, N. J.: Lawyer Ethics Code Drafting in the Twenty-first Century. p. 924.

<sup>32</sup> Cf. ANZENBACHER, A.: *Úvod do etiky*. pp. 105-112.

unenforceable and formally enforceable codes. However, in the case of the latter, the moral deliberation of an individual may be influenced by the thought of violating a legal rule, as stated in the adage '*it is not morally correct to violate the rules of a professional regulation*'. Moreover, individual decision-making may be influenced by the extra-moral apprehension of punishment for a violation; after all, '*acting against my conscience but in accordance with the regulation is preferable to legal sanction*'.

I also agree that the discourse about morals within any profession cannot be reduced to a code of ethics. However, I do not believe that codes of ethics necessarily play such a reductionist role in their respective professions.<sup>33</sup> As indicated above, an individual's conscience plays the principal role in moral deliberation. A code, similarly to a tradition, ethos or custom of the profession, represents only one variable that is taken into account. Moreover, a legalised or quasi-legalised moral norm does not lose its moral character as a result of legalisation. On the contrary, its moral character is expanded to include another feature: strict formalisation.

Of course, a code of ethics is not a panacea, and anyone who is uninclined to project moral deliberations into their decision-making will not begin to do so based on a code. Nonetheless, the regulatory function of a code may even impact such amoral actors, who will view a code of ethics as classical heteronomous regulation rather than as an internalised regulation analogous to moral conflict with another.<sup>34</sup>

I also agree that a code of ethics may be misused by the profession to strengthen the position of the profession in relation to the public, or of certain groups of professionals in relation to other existing or future groups. However, the potential for misuse does not mean that codes should be despised. After all, many things can be misused; a tool should only be abandoned if the risks arising from its misuse prevail over its benefits. In my opinion, this is not the case with codes of ethics. In fact, the opposite is true, the awareness of the potential for misuse should prompt increased vigilance when examining the content of codes of ethics and of their application.

Another concern states that codes of ethics lead lawyers towards moral mediocrity or the mechanical application of written rules. These arguments may be dispelled with reference to the previously mentioned statement: it is not the role of the code to be the 'Truth' revealed. Rather, the code is an invitation to discussion, a criterion in decision-making, but not the only one and not necessarily the final one.

Taken together, the above reasoning leads to a somewhat banal conclusion. To ascertain the benefits, if any, of a code of ethics to a profession, it is insufficient to think in general categories. Instead, we must consider real-world practice and examine what specific codes look like. Before looking in more detail at how codes of ethics work in the

<sup>33</sup> Cf. EVANS, A.: *The Good Lawyer*. Australia: Cambridge University Press, 2014, p. 203. Evans refers to Japanese, Canadian, and American codes of ethics, which remind lawyers that they should also take into account the wider context of general, rather than role-based, morality or social justice.

<sup>34</sup> I concur that it would be best if this type of regulation were unnecessary. However, I would prefer a world in which lawyers some act morally due to autonomous conviction and others due to heteronomous reasons to a world in which some lawyers act morally due to autonomous conviction and others act immorally for the same reason.

Czech Republic, we shall consider the extensively discussed features of codes: their principle-based or rule-based character.

## 2. A code of ethics – a call to loftiness or practical guidance?

The growing trend towards codes of ethics in legal professions has already been mentioned.<sup>35</sup> However, even within this trend, we see a shift from norms worded as principles towards norms worded as rules. Some authors use the terms ‘regulatory rules’ and ‘hortatory rules’; others use general rules or standards rather than hortatory rules. I shall mention one illustrative example from the United States,<sup>36</sup> bearing in mind that this is only a general trend. For example, the latest changes to the regulation applicable to solicitors in the United Kingdom may indicate that the approach of drafting norms as principles is returning.<sup>37</sup> A similar process can be seen in the Netherlands.<sup>38</sup>

What is the difference between principle-based and rule-based approaches? A code of ethics based on principles focuses its norms on the outcomes of activities, while a code based on rules focuses on a detailed description of procedures applicable to individual activities. The two approaches also differ in language: principles are written in general language, whereas rules are often detailed and unequivocal.<sup>39</sup> Some examples also show a difference in aspiration: while rules often state the minimum standard of conduct, principles try to achieve the highest goals.<sup>40</sup>

The advantages and disadvantages of both approaches can be inferred from these characteristics. Because a norm worded as a rule has more precise, specific language, it offers individuals much higher certainty that they are acting in accordance with or contrary to the norm. Such certainty would be especially appreciated when the code of conduct is formally binding and its violation results in a disciplinary proceeding and possible punishment. In such cases, legal professionals know exactly how to act in accordance with the code’s requirements. On the other hand, the general language of principles significantly empowers disciplinary bodies,<sup>41</sup> even though a norm worded as

<sup>35</sup> See the introduction in chapter 1.

<sup>36</sup> MOORE, N. J.: Lawyer Ethics Code Drafting in the Twenty-first Century. pp. 925-927.

<sup>37</sup> BARON, P., CORBIN, L.: The Unprofessional Professional: Do Lawyers Need Rules? pp. 163-164.

<sup>38</sup> The Netherlands’ *Design of rules of honour* of 1920 had gradually been replaced with the *Revised Rules of Conduct*. However, the shift from norms worded as principles towards norms worded as rules was relativised by the 2018 revision, which reflects an emphasis on core values of the profession in Section 10a(1) of the Act on Advocates. See DE GROOT-VAN LEEUWEN, L. E.: Polishing the Bar: The Legal Ethics Code and Disciplinary System of the Netherlands, and a Comparison with the United States. pp. 10-11. For the latest version of the Code of Conduct (with editorial explanatory note), see Code of Conduct 2018 [online]. The Netherlands Bar, 2018 [accessed 5 January 2021]. Available at: <[http://www.unode.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unode.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf)>://C:/Users/Dell14/Downloads/NOva%20Code%20o%20Conduct%20(Gedragsregels)%202018.pdf>.

<sup>39</sup> *Ibidem*, pp. 159-160.

<sup>40</sup> WILKINSON, M. A., WALKER, Ch., MERCES, P.: Do Codes of Ethics Actually Shape Legal Practice? p. 651. The concern about moral mediocrity in this context has been mentioned above.

<sup>41</sup> In this way, such bodies effectively become the regulator of the profession. When the bodies are part of the profession, the reservations about self-regulation, stated in subchapter 1.2, must be re-

a principle leaves the interpreter to determine specific procedure. In these situations, as is often the case, general wording can better cover the complexity of real-life situations, while too much specificity can amount to an unsystematic set of case descriptions that leave much room for doubt.<sup>42</sup> In both cases, formulating codes of ethics is a matter of degree. Some authors think that principles tend to encourage personal, internal motivation ‘to do the right thing’, whereas rules are external in nature.<sup>43</sup> However, to my mind, both principles and rules are external, and the difference is that principles allow actors more space to use their own invention to achieve the desirable outcome, since the language is general and the focus is on outcomes, whereas rules motivate actors to justify their following or failure to follow the procedure prescribed by the code.

Another point to consider is whether the norms are aimed at the feelings or rationality of the person acting. Rules tend primarily to impact persons who rely on reason to make decisions. However, recent research in neuroscience shows that this is not the only possible approach. On the contrary, decisions are often irrational and based on emotions. A famous story about the relationship between emotions and moral decision-making is the 1848 case of Phineas P. Gage. Gage was a railroad construction foreman in Vermont. While he was working with explosives to blast a rock, a premature explosion occurred. The explosion rocketed an iron tamping rod directly against Gage’s face. The rod entered the left side of Gage’s face, went through the frontal lobe of his brain and fractured his skull upon exit. To everybody’s surprise, Gage survived, with loss of eyesight in the left eye being his only physical injury. However, the injury to his brain caused a major change in Gage’s character and his ability to make moral decisions. The incident was used to infer the relationship between emotions and moral decision-making, since the injured part of Gage’s brain was where the emotions reside. Since the end of the 19<sup>th</sup> century, the above conclusion has been reinforced by further research, particularly since the invention of magnetic resonance imaging.<sup>44</sup> Principle-based norms worded with moral pathos, together with various types of ceremonies or oaths, etc. will likely affect individuals who make decisions based on emotions or moral intuition.<sup>45</sup> On the other hand, rule-based norms are more likely to affect recipients favouring a rationalised approach.

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emphasised. However, risk of misuse of general language is present, even when the bodies are not part of the profession.

<sup>42</sup> BARON, P., CORBIN, L.: *The Unprofessional Professional: Do Lawyers Need Rules?* pp. 160-161.

<sup>43</sup> BARON, P., CORBIN, L.: *The Unprofessional Professional: Do Lawyers Need Rules?* p. 159.

<sup>44</sup> CHAFEE, E. C.: *Death and Rebirth of Codes of Legal Ethics: How Neuroscientific Evidence of Intuition and Emotion in Moral Decision Making Should Impact the Regulation of the Practice of Law* pp. 340-345. Marek Zima warned me that the story of Phineas P. Gage has been questioned as insufficiently substantiated and not described in a scientific way. Such criticism may be well founded considering that it happened before modern imaging technologies were available. After consideration, I left the story in the text with this warning. The conclusions exemplified by the story have been substantiated by further research in recent years. In any case, I have not used the story as evidence, and neither did the quoted source. Rather, it serves to illustrate the relationship between moral decision making and emotions.

<sup>45</sup> *Ibidem*, p. 354. Importantly, this research did not claim that decisions made on the basis of emotions or intuition are necessarily morally correct.

Which of these approaches should be used? The opinions of various authors differ depending on the weight assigned in a given environment to the above-mentioned benefits and risks.<sup>46</sup> The environment in which the code will be used should be the decisive criterion for choosing between principle-based and rule-based norms. Even a combination of both may make sense.<sup>47</sup>

This takes us back to the conclusion of chapter one. Given that we should know the environment in which the code will be used when deciding on how the norms should be worded, we shall now make the last step towards specificity and consider the codes of ethics used in the Czech Republic.

### 3. Status of codes of ethics of lawyers in the Czech Republic

The situation in the Czech Republic shows that codes of ethics can take various forms and can be perceived very differently. This chapter consists of three subchapters, each dealing with the status of codes of ethics in one of the three largest Czech legal professions: the judiciary, prosecuting attorneys and attorneys-at-law.

We must first mention one basic distinction which greatly influences the form and use of individual codes, and which has so far been mentioned only marginally. While judicial codes of ethics are not legally enforceable, the code of ethics of attorneys-at-law and references to it form an integral part of the disciplinary practice of attorneys. Even the most recent code of ethics of prosecuting attorneys is an enforceable document. However, given that it only came into effect recently, few studies have focused on its application (see subchapter 3.2). The conclusions reached in the preceding chapters may be applicable to both legally enforceable and unenforceable codes. However, as shown below, legal enforceability vests a code of ethics with a much more favourable position.

#### 3.1 Judges and codes of ethics

The first of code of ethics of Czech judges is called *Etické zásady chování soudce* [*Ethical Principles of Judicial Conduct*] (hereinafter also ‘the code of ethics of the Czech Union of Judges’). As already discussed, this code does not constitute a legally binding document. It reflects the idea that, from the perspective of professional ethics, some acts by judges are seen as unacceptable morally despite being acceptable legally; that is, they are not wrongful, but they are undesirable.<sup>48</sup> The Ethical Principles of Judicial Conduct were created

<sup>46</sup> Cf. BARON, P., CORBIN, L.: *The Unprofessional Professional: Do Lawyers Need Rules?* p. 159 and the extensive sources listed there.

<sup>47</sup> This conclusion was reached by Fred Zacharias after he carried out an economic analysis of law. He pointed out that individuals subject to the norms of codes of ethics required better categorisation, subsequently categorising them into six groups, each of which was characterised by a different attitude to norms. Specifically, some groups were more easily influenced by principle-based norms, while others were more easily influenced by rule-based regulation; still others were not influenced by either of the two. ZACHARIAS, F. C.: *Steroids and Legal Ethics Codes: Are Lawyers Rational Actors?* *Notre Dame Law Review*, No. 2, 2010, pp. 672-711.

<sup>48</sup> HRDLIČKOVÁ, I.: *Potřebujeme etický kodex? [Do We Need a Code of Ethics?]* *Soudce*, No. 3, 2008, p. 9.

by the Czech Union of Judges [*Soudcovská unie České republiky*].<sup>49</sup> The first version of the Ethical Principles was approved on 28 October 2000 by a meeting of representatives of the various sections of the Czech Union of Judges; it was replaced by an amended version, which was approved in the same way on 26 November 2005. The main difference between the versions lay not in the fundamentals, but in the conciseness of the first version, which was a short statement of seven points comprising eight sentences. Over time, this turned out to be unsatisfactory. Jan Vyklický, the co-founder and later president and honorary president of the Czech Union of Judges, commented on the Ethical Principles' importance: '*Not many people knew them and practically nobody (apart from the drafters) saw any content behind them... Nobody referred to the adopted ethical theses in official positions or proceedings (e.g. disciplinary); put succinctly, the theses were not cultivated. They became dead words, or rather they have never come to life, in fact they have never existed*'.<sup>50,51</sup>

The new Ethical Principles of Judicial Conduct were supposed to address these issues. They were inspired by the so-called Bangalore Principles of Judicial Conduct and provided more detailed coverage of individual topics.<sup>52</sup> In addition to the preamble, the principles cover six groups of topics, each of which is devoted to a morally sensitive issue of judicial life (impartiality, independence, integrity, dignity, equality and expertise). These topics are introduced by a statement of the general principle, which is then expanded into relatively specific rules.<sup>53</sup> As noted by Jan Vyklický when comparing the Bangalore Principles with the Czech principles: '*None of the mentioned sources departs from the standard in the wording of principles. Virtually identical sentences may be found in every code of conduct in the United States or Europe and all others that are based on this tradition*'.<sup>54</sup> However, the recently deceased author saw a difference in the

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<sup>49</sup> This is a voluntary professional association of judges in the Czech Republic, taking the form of an association of persons. It is not vested with any special legal powers over its members. Around a half of all judges in the Czech Republic are members of the Czech Union of Judges. Therefore, the Czech Union of Judges cannot be perceived as a self-governing body of judges or as a spokesperson of the judiciary. However, it has significant influence in the field of professional ethics, particularly because it is the only association of this type and there is no self-governing body of the judiciary in the Czech Republic. It comes as no surprise that at least the public, including the media, consider the Czech Union of Judges to be a self-governing body of the judiciary. Similarly, the legislature and executive branch treat the Czech Union of Judges differently from a 'common' professional association of persons.

<sup>50</sup> VYKLICKÝ, J.: *Nezáleží víc na soudci než na právu?* [Does the Judge not Matter more than the Law?] *Soudce*, No. 5, 2006, p. 5.

<sup>51</sup> Regarding the comment of Jan Vyklický on the use of the code in disciplinary proceedings, the second version of the code did not garner much attention from disciplinary panels either. There is only one reference to the code in the reasoning of a judicial disciplinary panel, occurring in a decision of the disciplinary panel of the Supreme Administrative Court file ref. 11 Kss 5/2011 of 21 September 2011.

<sup>52</sup> For more on the Bangalore code, see The Bangalore Principles of Judicial Conduct [online]. UNODC, 2002 [accessed 27 September 2020]. Available at: <[http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf)>.

<sup>53</sup> Consolidated Ethical Principles of Judicial Conduct (II) [online]. Soudcovská unie České republiky, z.s. [accessed 27 September 2020]. Available at: <<http://www.soudci.cz/o-nas/eticke-zasady-chovani-soudce.html>>.

<sup>54</sup> VYKLICKÝ, J.: *Nezáleží víc na soudci než na právu?* p. 6. Cf. MOLITERNO, J. E., PATON, P. D.: *Globální problémy profesní etiky právníků.* [Global Issues in Legal Ethics] Translation and commentary on the Czech edition by Kopa, M., Tomoszek, M., Dohnal, V., Praha: Wolter Kluwer ČR, 2017, p. 162 et seq.

fulfilment of the content of the codes: '*In our country, there is emptiness behind the principles; there is no experience, very limited comparative sources, no education or guidance from history, and mainly no convincing evidence of willingness to accept the restrictive rules*'.<sup>55</sup> Therefore, the second version of the Ethical Principles did not attract the desired attention. This may change with the Open Set of Ethical Dilemmas of Judges [*Otevřený soubor etických dilemat soudce*], which was published by the Czech Union of Judges in 2020. It was based on, and substantially expanded, the code of ethics of the Czech Union of Judges. The basic rules and principles of this code of ethics are expanded in the Open Set to include relevant cases of (primarily) the disciplinary panels, as well as commentaries on 'groups of dilemmas', including sets of questions that judges should ask when making a decision on their conduct in a given field.<sup>56</sup> To fulfil the principle of openness, the document should be amended continuously by the bodies of the union.

Relatively recently, in reaction to the controversial conduct of several judges online, the Union issued a 'sub-code' of ethics entitled Ethical Boundaries of Judges' Use of Social Media [*Etické meze působení soudu na sociálních sítích*].<sup>57</sup> Hence, the Union became one of the judicial commissions reacting to the fast growth of social media in their opinions, recommendations and regulations.<sup>58</sup>

Given that both the Ethical Boundaries of Judges' Use of Social Media and the Open Set of Ethical Dilemmas of Judges were issued relatively recently, it is unclear whether these documents will have a greater influence than their predecessors on the Czech Union of Judges or on the judiciary as a whole. Nonetheless, we must grant that these documents have the potential to fill up 'the emptiness behind the principles'.

The future of the document called the Code of Ethics [*Etický kódex*], which was drafted this year at the Supreme Court of the Czech Republic under the leadership of Petr Angyalossy, President of the Court, also remains unknown. The text of the document has not yet been published. However, semi-official reports indicate that it openly draws formal and ideational inspiration from the Open Set of Ethical Dilemmas of Judges and further expands upon them. Unlike the Open Set, which is an internal document of an association of judges with voluntary membership, the Code of Ethics intends to be the code for 'all judges'. Its wording has been sent out to all courts in the Czech Republic,

<sup>55</sup> *Ibidem*, p. 7.

<sup>56</sup> Open Set of Ethical Dilemmas of Judges [online]. Soudcovská unie České republiky, z.s. [accessed 27 September 2020]. Available at: <<http://www.sucr.cz/o-nas/otevreny-soubor-etick%C3%bdch-dilemat-soudu.html>>.

<sup>57</sup> Ethical boundaries of judges' use of social media [online]. Czech Union of Judges [accessed 27 September 2020]. Available at: <<http://www.soudci.cz/zpravy-a-stanoviska/pohledy-a-nazory/843-etickemeze-pusobeni-soudce-na-socialnich-sitich.html>>. This is an output of the Ethical Panel of the Czech Union of Judges, which is, according to the statutes of the union, authorised to express opinions on cases related to the code of ethics. (See s. 28 of the statutes of the Czech Union of Judges). Unfortunately, it is the only freely accessible output of the Ethical Panel.

<sup>58</sup> Here are a few examples: JONES, S. V.: Judges, Friends and Facebook: The Ethics of Prohibition. *Georgetown Journal of Legal Ethics*, Vol. 24, No. 2, 2011, pp. 281-302 or MITCHELL, N. J.: Judge 2.0: a New Approach to Judicial Ethics in the Age of Social Media. *Utah Law Review*, No. 4, 2012, pp. 2139-2141 and GRAY, C.: Judicial Disqualification and Friendships with Attorneys. *Judges' Journal*, Vol. 52, No. 3, 2013, pp. 20-22.

with a call for the code to be discussed. It is already clear from media reports that the code is unlikely to be adopted unanimously.<sup>59</sup> Therefore, it remains to be seen how the document will be treated if it is not adopted by all judges.

At present, the notion that the code should apply to all judges seems embarrassingly premature. The code was drafted with contributions from several judges from all levels of the judiciary, but the text has not yet been made available to all judges or to the professional public, let alone the public at large, for comment. When it was simply sent out for discussion to the system of courts, its drafters probably did not anticipate any disapproval of the document, especially since the Code is likely intended as an informal document which is not legally binding.<sup>60</sup> Furthermore, some have questioned whether the Code of Ethics was really conceived by a group of experts at the Supreme Court to deal with an important topic, claiming that it arose from the political desire to satisfy the recommendations of the *Group of States against Corruption* (GRECO), which has repeatedly called on the Czech Republic to adopt such a document.<sup>61</sup> This question will be answered no sooner than in the coming months and in the further development of approval of the document by all judges.

### **3.2 Prosecuting attorneys and codes of ethics**

As in the case of judges, the code of ethics of prosecuting attorneys entitled *Code of Morals of Prosecuting Attorneys [Mrvní kódex státního zástupce]* was drafted by their professional organisation: the Czech Union of Prosecuting Attorneys [Unie státních zástupců České republiky].<sup>62</sup> The Code of Morals of Prosecuting Attorneys has no

<sup>59</sup> Krátké z justice: Přijetí soudcovského etického kodexu se začíná komplikovat. [Brief reports from the judiciary: Approval of the Judicial Code of Ethics Becomes Complicated] [online], *Lidovky.cz*, 2020 [accessed 27 September 2020]. Available at: <[https://www.lidovky.cz/byznys/pravo-a-justice/kratce-z-justice-prijeti-soudcovskeho-etickeho-kodexu-se-zacina-komplikovat.A200829\\_212603\\_In\\_byznys\\_pravo\\_ss](https://www.lidovky.cz/byznys/pravo-a-justice/kratce-z-justice-prijeti-soudcovskeho-etickeho-kodexu-se-zacina-komplikovat.A200829_212603_In_byznys_pravo_ss)>.

<sup>60</sup> Předseda Nejvyššího soudu Petr Angyalossy vystoupil na mezinárodní konferenci Etika v právu s příspěvkem na téma Etický kódex českého soudu. [Petr Angyalossy, the President of the Supreme Court, made a presentation entitled ‘the Code of Ethics of a Czech Judge’ at an international conference on Ethics in Law] [online]. The Supreme Court, [accessed 27 September 2020]. Available at: <[http://www.nsoud.cz/Judikatura/ns\\_web.nsf/web/ProverejnostaMedia~TiskovezpravyNejvyssihirosoudu~Predseda\\_Nejvyssihirosoudu\\_Petr\\_Angyalossy\\_vystoupil\\_na\\_mezinarodni\\_konferenci\\_Etika\\_v\\_pravu\\_s\\_prispevkem\\_na\\_tema\\_Eticky\\_kodex\\_ceskeho\\_soudce~](http://www.nsoud.cz/Judikatura/ns_web.nsf/web/ProverejnostaMedia~TiskovezpravyNejvyssihirosoudu~Predseda_Nejvyssiho_soudu_Petr_Angyalossy_vystoupil_na_mezinarodni_konferenci_Etika_v_pravu_s_prispevkem_na_tema_Eticky_kodex_ceskeho_soudce~)>.

<sup>61</sup> Cf. point 41 et seq. of the latest Interim compliance report of the Fourth evaluation round (Adoption: 6 December 2019, 9<sup>th</sup> Public Publication: 5 March 2020). Available at: <<https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/16809ccdf3f>> as well as the preceding Interim compliance report. Importantly, GRECO requested that the code be communicated effectively only to other judges, rather than adopted by them. It would therefore be sufficient to meet the recommendation that the code be *sent out* to judges, irrespective of the positions that individual courts and judges adopted towards the code.

<sup>62</sup> The Czech Union of Prosecuting Attorneys, similarly to the Czech Union of Judges, has the legal form of an association of persons, and membership therein is voluntary. To reiterate, the Czech Union of Prosecuting Attorneys has no special legal powers over its members. Approximately one quarter of all prosecuting attorneys are members of the Czech Union of Prosecuting Attorneys. And like the Czech Union of Judges, the Czech Union of Prosecuting Attorneys has considerable influence because there is no other umbrella entity of prosecuting attorneys’ offices.

generally binding effect and its breach can have consequences only within the association. The code was adopted by the Assembly of Representatives of Sections of the Union of Prosecuting Attorneys<sup>63</sup> in April 1999 and was published in the journal *Union*, No. 2.<sup>64</sup> From a formal perspective, more detailed texts likely exist. The entire code consists of approximately one standard page of text structured into ten paragraphs, without any further headings or subparagraphs. The text is introduced by a brief preamble referring to the importance of prosecuting attorneys. The Union of Prosecuting Attorneys tried to compensate for the simplicity of form by showing cases in which the code had been applied. Within its powers, the Ethics Commission of the Union of Prosecuting Attorneys issues opinions and statements in which it analyses and evaluates topics related to professional ethics.<sup>65</sup> Thus, we have learned the opinions of the Ethics Commission when (1) a prosecuting attorney expressed, in an open letter to the Minister of Justice, concerns about the further engagement of the former Attorney General; (2) a prosecuting attorney accepted a loan from questionable sources and under questionable circumstances<sup>66</sup>; (3) the buildings of a prosecuting attorney's office were used to house an art exhibition, which was funded by the office in cooperation with business entities that often appeared in criminal proceedings as injured parties; (4) they evaluated the participation of prosecuting attorneys in television quiz shows; (5) they evaluated the membership of prosecuting attorneys in Rotary Clubs; (6) prosecuting attorneys used municipal flats at more advantageous conditions; (7) a prosecuting attorney acted as a lecturer based on a trade licence. The only case in which the Ethics Commission issued a statement rather than an opinion was to request an evaluation of the involvement of prosecuting attorneys in bodies of juridical persons.<sup>67</sup> The reasoning in individual resolutions is not extensive, but the effort to get involved in such a discussion merits positive evaluation. On the other hand, we cannot be sure how influential the Ethics Commission is within the profession. The above list mentions all available opinions of the Ethics Commission since its establishment in 2008. Thus, the possibility to issue an opinion is rarely used, and several areas of concern regarding the professional ethics of prosecuting attorneys remain unexplored.

<sup>63</sup> Under Art. 10 of the Statutes of the Czech Union of Prosecuting Attorneys, the Assembly of Representatives of Sections is the supreme body of the association of persons.

<sup>64</sup> CRHA, L.: Státní zástupce a etika aneb jak mít mravy. [Prosecuting Attorneys and Ethics or How to Have Morals] In: MATULA, Z. (et al.): *Union 2012. Ročenka Unie státních zástupců České republiky*. [Union 2012. The Yearbook of the Czech Union of Prosecuting Attorneys] Praha: Unie státních zástupců, 2013, p. 15. The Code of Morals of Prosecuting Attorneys is also available online. For more, see Code of Morals [online]. Czech Union of Prosecuting Attorneys [accessed 27 September 2020]. Available at: <<https://www.uniesz.cz/vnitri-predpisy/mravni-kodex/>>.

<sup>65</sup> The opinions of the Ethics Commission are unanimously adopted resolutions. Only once has a unanimous consensus not been reached. In that case, the result of the Ethics Commission meeting was issued as a statement rather than an opinion. For more, see Art. IV of the Statutes and Code of Procedure for Ethics Commission, available in MATULA, Z. (et al.): *Union 2012. Ročenka Unie státních zástupců České republiky*. p. 128 et seq.

<sup>66</sup> Cf. the decision of the disciplinary panel of the Supreme Administrative Court of 3 April 2014, file ref. 12 Ksz 5/2011.

<sup>67</sup> See the last two pages on Opinions and Statements [online]. Unie státních zástupců České republiky [accessed 27 September 2020]. Available at: <<https://www.uniesz.cz/category/stanoviska-a-vyjadreni/>>.

The creation of another code of professional ethics of prosecuting attorneys was described by Lumír Crha, who was present when the code was being made. He wrote that, after 1989 and the Velvet Revolution, which put an end to the communist regime and launched the development of democracy in Czechoslovakia, '*suddenly everything changed, and often it changed to the reverse ... [monopolies, doing business, dictatorship of a single party, freedom]...What was protected by the old regime was suddenly a criminal offence*'.<sup>68</sup> Radical social changes also resulted in prosecuting attorneys becoming disoriented in their professional field, reflecting a lack of uniformity in the evaluation of specific acts. Crha cited the need to achieve this uniformity as the reason for creating the *Code of Professional Ethics of Prosecuting Attorneys* [*Kodex profesionální etiky státního zástupce*].

He recalled another reason from an operative meeting of the Attorney General in 2003. One of the participants mentioned the case of a managing prosecuting attorney who invited a car dealer to offer his cars to participants at the end of a meeting. Crha had a vivid recollection of people's reaction at the Attorney General's operative meeting: '*We could not think of what it violated. In the end we had no other option than to state that it was somehow... unethical*'.<sup>69</sup> This event prompted attendees to revive existing ideas to create a code of ethics of prosecuting attorneys that would influence all prosecuting attorneys and would therefore exist side by side with the Code of Morals of Prosecuting Attorneys, which is important primarily for members of the Czech Union of Prosecuting Attorneys.

The working group consisting of both deputies of the Attorney General, the director of the office of the Attorney General, the director of the analytical and legislative department and the president of the Czech Union of Prosecuting Attorneys. They began work in the autumn of 2003 and published the code in the journal *Státní zastupitelství* [*Prosecuting Attorney's Office*] in the summer of the following year. The Code of Professional Ethics of Prosecuting Attorneys was a non-binding document and remained only a 'moral appeal', even though it had been created at the Attorney General's Office.

The code is introduced by a preamble explaining the status of the prosecuting attorney in the legal system and the need for a code of moral rules. The preamble also included sources for further inspiration, particularly the *IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*, which was adopted by the International Association of Prosecutors (IAP) in Amsterdam on 23 April 1999. Other sources mentioned include the above Ethical Principles of Judicial Conduct and Code of Morals of Prosecuting Attorneys. The preamble is followed by a definition of eight areas of regulation: independence, impartiality, objectiveness, professionalism, initiative, dignified behaviour, cooperation and trustworthiness, which are introduced by a short statement and followed by a more detailed description.

The Code of Professional Ethics of Prosecuting Attorneys was an interesting attempt

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<sup>68</sup> CRHA, L.: *Státní zástupce a etika aneb jak mít mravy. [Prosecuting Attorneys and Ethics or How to Have Morals]* In: MATULA, Z. (et al.): *Union 2012. Ročenka Unie státních zástupců České republiky*. p. 15.

<sup>69</sup> *Ibidem*, p. 15.

to present the topic of professional ethics to those prosecuting attorneys who did not sympathise with the Czech Union of Prosecuting Attorneys, as well as to those who may have had reservations about the Code of Morals of Prosecuting Attorneys. However, prosecuting attorneys seemed to take a rather reserved attitude, judging from the number of reactions it received when it was created—the draft was sent out to all prosecuting attorney's offices in the country for comments; only one comment arrived and two notes of positive feedback.<sup>70</sup>

For this reason, the *Code of Ethics of Prosecuting Attorneys [Eticky kodex státního zástupce]* was published in 2019 and replaced the Code of Professional Ethics of Prosecuting Attorneys. According to information from the Attorney General's Office, this code is binding for all prosecuting attorneys.<sup>71</sup> It was issued as a joint venture of the Attorney General, managing High Prosecuting Attorneys, managing Regional Prosecuting Attorneys, and managing Metropolitan Prosecuting Attorney in Prague. The code is a brief document of approximately 360 words that focuses on six fields: Legality and independence, Impartiality, Professionalism, Trustworthiness, Dignity and conduct, and Cooperation. This brief code is expanded by the document entitled *Code of Ethics of Prosecuting Attorneys. Commentary [Eticky kodex státního zástupce. Komentář]*, which contains approximately 29 pages that further expand on individual provisions of the Code of Ethics, comment on them and add an overview of related legal regulation, relevant case decisions, including disciplinary decisions in cases involving judges, and references to the above-listed opinions of the Ethics Commission of the Czech Union of Prosecuting Attorneys. Unlike the Code of Ethics, the content of the Commentary is not binding and, for the time being, the binding nature of the Code of Ethics must be accepted with a certain half-heartedness. It was adopted as a *measure* under s. 13c (7) of Act No. 283/1993 Sb., to Regulate Prosecuting Attorney's Offices. However, disciplinary practice typically involves the violation of *legal duties* by the prosecuting attorney, rather than the violation of duties arising from the *measures* issued under the above section.<sup>72</sup> In addition, the text of the measure used to issue the Code of Ethics of Prosecuting Attorneys, which is likely to contain other relevant provisions, has not been made available to the public.

As with the code of ethics of Czech judges, the future treatment of the Code of Ethics of Prosecuting Attorneys should be monitored. The code may have been created in response to external pressure from GRECO, as mentioned in the case of Czech judges, rather than prompted by a genuine effort from prosecuting attorney's offices to define the key values of the profession.<sup>73</sup>

<sup>70</sup> *Ibidem*, p. 16.

<sup>71</sup> Code of Ethics of Prosecuting Attorneys [online]. Attorney General's Office [accessed 1 October 2020]. Available at: <<https://verejnazaloba.cz/vice-o-sz/eticky-kodex-statniho-zastupce/>>.

<sup>72</sup> Cf. Only one decision of the disciplinary panel in cases of prosecuting attorneys works at least with the possibility of inferring disciplinary responsibility for violation of duties arising from the measure, file ref. 12 Ksz 7/2016 – 134 of 28 February 2017.

<sup>73</sup> Cf. point 65 et seq. of the Interim compliance report of Fourth evaluation round (Adoption: 6 December 2019, 9 Public Publication: 5 March 2020). Available at: <<https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/16809ccd3f/>>

### 3.3 Attorneys-at-law and codes of ethics

*The Rules of Professional Ethics and Rules of Competition among Attorneys-at-Law of the Czech Republic [Pravidla profesionální etiky a pravidla soutěže advokátů České republiky]* ('Code of Ethics of Attorneys') fulfils a completely different role among attorneys than do codes of ethics among judges and prosecuting attorneys. Thanks to its long-term legal enforceability, the Code of Ethics of Attorneys holds more authority and is frequently used in the reasoning of decisions issued by disciplinary bodies of the Czech Bar Association.<sup>74</sup>

The Code of Ethics of Attorneys is assumed by law, unlike the codes of judges and prosecuting attorneys.<sup>75</sup> It was adopted on 31 October 1996 by a resolution of the Board of Directors of Association No. 1/1997 of the Journal. The father of the wording of the code was Karel Čermák, who also wrote an extensive commentary on the code.<sup>76</sup>

The commentary on the Act on the Legal Profession lists four purposes for the code. The first is the protection of consumers of legal services in contact with attorneys-at-law. The second and third purposes focus on the legal profession, protecting the legal profession as a whole as well as individual attorneys-at-law as competitors on the market of legal services. The last listed purpose of the code is the protection of public interests, referring to third parties in contact with attorneys-at-law. As for the functions of the Code of Ethics of Attorneys, the commentary first lists the normative function. It also points out the significance of the educational function, given that no such regulation has existed in the Czech Republic for almost fifty years and that there has been significant growth in the number of attorneys.<sup>77</sup>

The Code of Ethics of Attorneys consists of four parts: applicability of the rules of professional ethics and competition rules of the Czech attorneys-at-law, rules of professional ethics, competition rules of attorneys-at-law, final provisions. The *gros* of the rules concerning legal practice can be found in the second and third parts. It is more detailed and extensive than the other codes, and it is constantly revised based on

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<sup>74</sup> In contrast to the above-mentioned associations of persons, the Czech Bar Association is a juridical person established under Act No. 85/1996 Sb., on the Legal Profession, with obligatory membership of all practicing attorneys-at-law.

<sup>75</sup> S. 17 of Act No. 85/1996 Sb., on the Legal Profession.

<sup>76</sup> ČERMÁK, K.: *Pravidla profesionální etiky a pravidla soutěže advokátů České republiky. Text s komentářem JUDr. Karla Čermáka.* [The Rules of Professional Ethics and Rules of Competition among Attorneys-at-Law of the Czech Republic. Text with commentary by JUDr. Karel Čermák] Praha: Česká advokátní komora [Czech Bar Association], 1996, 72 p. The text is also available online at <[http://www.cak.cz/assets/files/180/BA\\_00\\_Z1.pdf](http://www.cak.cz/assets/files/180/BA_00_Z1.pdf)>.

<sup>77</sup> ČERMÁK, K., VYCHOPEŇ, M.: *Komentář etického kodexu.* [Commentary on the Code of Ethics] In SVEJKOVSKÝ, J., VYCHOPEŇ, M., KRYM, L. (et al.): *Zákon o advokaci: komentář.* [The Act on the Legal Profession: Commentary] Prague: C.H. Beck, 2012, pp. 439-440. The quoted text seems identical to the text contained in ČERMÁK, K.: *Pravidla profesionální etiky a pravidla soutěže advokátů České republiky. Text s komentářem JUDr. Karla Čermáka.* [The Rules of Professional Ethics and Rules of Competition among Attorneys-at-Law of the Czech Republic. Text with commentary by JUDr. Karel Čermák.] Prague: Česká advokátní komora [Czech Bar Association], 2000, pp. 18-19.

disciplinary practice.<sup>78</sup> The Czech Bar Association also briefly informs its members and the public on developments in disciplinary practice through a regular section called *News from Disciplinary Practice* in the professional journal of the legal profession entitled *Bulletin advokacie*. Once every two years, special issues of the journal are issued under the title *Collection of Disciplinary Decisions [Sbírka kárných rozhodnutí]*. (This raises awareness and revives the code through disciplinary practice. As already noted, it does not necessarily mean that such reviving cannot be beneficial to moral thinking; provided that the disciplinary practice concerns legalised moral rules.)

## In place of a conclusion

This paper primarily offered a general reflection on the issues surrounding codes of ethics, with the backdrop of circumstances in the Czech Republic. Such a reflection cannot offer any conclusions other than general ones. Nonetheless, I believe that readers interested in codes of ethics will benefit from the conclusions.

Naturally, many of the features mentioned here could be covered in more detail in future. For example, further studies should discuss how the binding nature of codes of ethics influences both the importance of such codes in professional practice and the (im) morality of decision-making by an individual.<sup>79</sup> Moreover, individual codes both and outside in the Czech Republic could be analysed in more detail using either the criteria listed in chapter one, the perspectives of chapter two, or otherwise.<sup>80</sup> There is a whole range of possibilities for research into codes of ethics. In any case, the present paper highlights that, when researching codes of ethics, we should focus on both the content of the code and the kind of life that the code has.

<sup>78</sup> However, the Code of Ethics of Attorneys is also rather brief and lacking in detail. The Model Code of Professional Responsibility of the American Bar Association, which was infamous for its long-windedness and was soon replaced for that reason, consisted of 93 pages of dense text, including notes and the index. However, the length and level of detail of a regulation does not guarantee its quality or ease of application; this is true of both the regulation of professional ethics and regulation in general. The Model Code yielded to such reasoning and, in 1983, was replaced by the Model Rules of Professional Conduct, which are still in use today.

<sup>79</sup> In this context, it may be worthwhile to examine more closely the relationship between the binding status of codes of ethics and the manner of their adoption, whether by state-authorized or non-state-authorized bodies. At first glance, one may assume that any code originating from a state authority would be binding and would have a high impact on the practice of law. However, the objections mentioned in subchapter 1.2 could be raised against such ‘forced’ influence. In addition, the situation with the categories could be more complex. Taking the United States as an example, the American Bar Association’s Model Rules of Professional Conduct was adopted by a non-governmental organization with voluntary membership. Despite this, it has traditionally had a significant impact on how states regulate the profession of lawyer. For a critique of how the conduct of lawyers is regulated in the United States, see BARTON, B. H. *The lawyer-judge bias in the American legal system*. New York: Cambridge University Press, 2011, pp. 122–126 and 154–159.

<sup>80</sup> For example, researchers who authored one of the papers quoted here conducted structured interviews with attorneys-at-law on the importance of codes of ethics. See WILKINSON, M. A., WALKER, Ch., MERCES, P.: Do Codes of Ethics Actually Shape Legal Practice?, p. 653 et seq. They found out that the code of ethics in Ontario is basically not used in practice. When it is used, it mostly inhibits independent moral deliberation.

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