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LEGISLATIVE REGULATION OF CRIMINAL LIABILITY OF JUDGES FOR PASSING AN UNJUST OR ILLEGAL JUDGEMENT

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Bohdanevych T., Bzova L. Legislative regulation of criminal liability of judges for passing an unjust or illegal judgement.

The article provides an analysis of the legislative regulation of criminal prosecution of judges for making a deliberately unlawful decision or in violation of procedural law. International standards on of criminal liability of judges and judicial immunity, as well as judicial decision, and generalized approaches of legislators of other states to criminalization of rendering an unjust, illegal and/or unreasonable or biased judgement, and for comparison and other acts related to the performance of judicial duties. The article examines the provisions of the Criminal Procedure Code of Ukraine regarding the legality and validity of a court decision. A court decision is based on the principles of the rule of law, it must be made by a court in accordance with the substantive law and in compliance with the procedural law, and must meet the objectives of the relevant legal proceedings, but if it is made on the basis of insufficiently and comprehensively clarified circumstances, then it is an unreasonable court decision that is not deliberately unjust.

The study was also based on the case law of national and international courts. The issue of interpretation of “criminal liability” was based on the study of the practice of the Constitutional Court of Ukraine. Compliance with the procedural procedure for bringing judges to criminal liability contributes to the observance of guarantees of their inviolability and independence, plays an important role in the resolution of criminal proceedings on the merits and is a prerequisite for observance of the general principles of criminal proceedings and the delivery of a lawful, reasoned and motivated court decision.

The article highlights that the concepts of “injustice”, “illegality” and “unreasonableness” are not synonymous and have different procedural content.

Key words: judicial immunity, criminal liability, international standards, status of a judge, court decisions.

Богданевич Т., Бзова Л. Законодавче регулювання кримінальної відповідальності суддів за постановлення неправосудного або незаконного судового рішення.

У статті проаналізовано законодавче регулювання кримінального переслідування суддів за постановлення завідомо неправосудного рішення або з порушенням норм процесуального права. Проаналізовано міжнародні стандарти щодо кримінальної відповідальності суддів та суддівського імунітету, а також судового рішення, узагальнено підходи законодавців інших держав до криміналізації постановлення неправосудного, незаконного та/або необґрунтованого чи упередженого судового рішення, а для порівняння й інших діянь, пов'язаних із виконанням суддівських обов'язків. У статті проаналізовано положення Кримінального процесуального кодексу України щодо законності та обґрунтованості судового рішення. Судове рішення ґрунтується на засадах верховенства права, має бути ухвалене судом відповідно до норм матеріального права та з додер-

жанням норм процесуального права, відповідати завданням відповідного судочинства, але якщо воно ухвалене на підставі недостатньо і не всебічно з'ясованих обставин, то це є необґрунтованим судовим рішенням, яке не є завідомо неправосудним.

Дослідження також ґрунтувалося на практиці національних та міжнародних судів. Питання тлумачення поняття “кримінальна відповідальність” ґрунтувалося на вивченні практики Конституційного Суду України. Дотримання процесуального порядку притягнення суддів до кримінальної відповідальності сприяє дотриманню гарантій їх недоторканності та незалежності, відіграє важливу роль у вирішенні кримінального провадження по суті та є необхідною умовою дотримання загальних засад кримінального провадження та постановлення законного, обґрунтованого і вмотивованого судового рішення.

У статті підкреслюється, що поняття “несправедливість”, “незаконність” і “необґрунтованість” не є синонімами і мають різний процесуальний зміст.

Ключові слова: суддівський імунітет, кримінальна відповідальність, міжнародні стандарти, статус судді, судові рішення.

Problem statement. The assessment of the quality of justice is confronted with the evolution over time of quality criteria, their diversity and the variety of ways of monitoring them. Over the last two decades, the issue of quality of justice has gained importance in public debate as it responds to new concerns or demands arising from the realization of the limits of a purely legal approach to the functioning of justice. In contrast to disciplinary liability, which relates to a breach of the duties of impartiality, fairness, diligence, confidentiality and balance that a judge owes to the state from the moment of appointment, criminal liability is liability that arises on the part of persons performing a judicial function towards the parties to proceedings or others when they make mistakes or fail to comply with their functions.

Processing status. The issues of criminal liability for delivering a judge’s knowingly unjust verdict, decision, ruling or resolution have been the subject of consideration by such scholars as M.I. Khavroniuk, O.M. Kaliuzhna, O.M. Ovcharenko, L.M. Paliukh, M.A. Pogoretskyi, O.P. Slobodianyuk, V.I. Tiutiugina, V.D. Chabaniuk and others.

The purpose of the article is to study the legal regulation of the issue of bringing a judge to criminal liability for rendering an unjust or illegal court decision.

Presentation of the main material. Researchers argue that judges are not criminally liable for their decisions under the laws of England, Ireland, and Cyprus. In some other countries, judges are not criminally liable for acts committed in connection with the performance of their official duties (except for corruption offences). This is the situation in Andorra, Italy, Liechtenstein, Norway, Portugal, Slovenia, Sweden, as well as Romania, Hungary, Croatia [4]. A sign of a relevant court decision as an object of crime is its unjustness. In the axiological (value) sense, it means inconsistency with law and justice. But for to apply this term in criminal law, clear criteria must be defined of what is just and what is not. Such criteria have not yet been defined in court practice.

V. Tiutiugin and co-authors provide a number of definitions of the concept of “injustice”. The Legal Encyclopedia defines an unjust verdict as “a judicial act delivered contrary to the established factual circumstances of the case or with a significant violation of the substantive or procedural law”. Similar definitions are found in other scientific works. O. Kartashov defines the unjustness of a verdict as its inconsistency (in any part) with the actual circumstances of the legal conflict that is subject to judicial review, which is expressed in the incorrect application of substantive and (or) procedural law. O. Kvasha notes that an unjust judicial act should be understood as a judicial act that does not meet the requirements of legality and validity, which may consist of incorrect application of substantive law, violation of the Constitution, procedural law or inconsistency of the court’s conclusions with the actual circumstances of the case [3].

According to the 2010 recommendation of the Committee of Ministers of the Council of Europe, “interpretation of the law, assessment of facts or evidence... should not give rise to criminal liability, except in cases of criminal intent” []. It is also envisaged that “judges should not be held personally liable for cases where their decisions are overturned or modified in the course of appeal proceedings». Thus, there is a possibility of criminal prosecution only “if there is malicious intent or criminal negligence”.

In its Decision No. 7-p/2020 dated 11 June 2020, the Constitutional Court of Ukraine proceeds from the fact that Article 375 of the Criminal Procedural Code does not establish criteria by which it

is possible to determine which verdict, decision, ruling or resolution of a judge (judges) is “unjust”, and also does not disclose the meaning of the phrase “knowingly unjust”, which makes it possible to understand ambiguously the elements of the crime qualified under this provision [5].

The wording of the disposition of Article 375 of the Criminal Procedural Code allows for the possibility of its abuse by pre-trial investigation authorities when they take actions that result in criminal prosecution of a judge only for the fact of his/her judgement, which, in the subjective understanding of the investigator, prosecutor or any other person, is “unjust” (in particular, in case of disagreement with this judgement).

V.V. Lemak notes that in the last few years, the judicial system has been attacked by thousands of criminal proceedings on this basis. Only in 2015-2019, 2718 such proceedings were registered. The scale of these actions indicates that Article 375 of the Criminal Procedural Code is used as a tool to influence the independence of judges. On the other hand, the number of proceedings sent to court was low (two in 2019). That is, the problem was twofold: a) the number of materials entered into the Unified Register of Pre-trial Investigations was a means of dissatisfaction and influence of authorised state bodies or participants in the proceedings (parties to the case); b) the procedural effect of this practice was negligible, except for the psychological impact on judges during their consideration of specific cases or as a result of their outcomes [6].

The assertion that the wording in Article 375 of the Criminal Procedural Code “knowingly unjust decision” is “vague” has no rational basis. The requirement of “certainty” in the sense of one of the aspects of the rule of law does not automatically follow in every case when a general category is used in the text of a legal provision to describe a type of behaviour. Every legal provision uses such categories, and law as a social phenomenon cannot realise its normative potential without them. In other words, it is impossible to avoid the situation when legal provisions are stated in terms that are to some extent unclear.

In its ruling of 20 June 2019, the Supreme Court noted in relation to the application of Article 375 of the Criminal Procedural Code that «the concept of ‘unjust court decision’ is not defined at the legislative level, nor has it been explained by the Constitutional Court of Ukraine, there are no grounds to equate it with such concepts as “illegal” and “unreasonable”, and there are no grounds to assert that an unjust court decision is in any case a decision that has been cancelled by a higher court. ... the concept of “unjust court decision” in combination with the indication of “knowing” of its delivery emphasises the purposeful nature of the criminal actions of the judge, his/her conscious desire and desire, contrary to the substantive or procedural law and/or factual circumstances established in the case, to deliver a court decision that inherently cannot be and is not an act of justice. The unjustness of a court decision may be evidenced by deliberate distortion of the actual circumstances of the case, misrepresentation of factual data, etc [2].

Even in the said resolution of the court of cassation, certain qualitative characteristics of the “unjustness” of a court decision are defined, in particular, such a decision may be made by a judge with distortion of the actual circumstances of the case, distortion of factual data. At the same time, if the subject of the Supreme Court’s doctrinal study was the evaluative concept of “deliberately unjust court decision”, it could be concluded that this concept does not and cannot have any comprehensive definition, and the qualitative characteristics of “unjust” court decisions are always associated with the threat of distortion of the judge’s opinion on the resolution of a legal dispute, criminal charge or other issue [7].

An analysis of the criminal legislation of certain foreign countries shows that a similar (and possibly identical) corpus delicti exists in their national legislation.

Acts related to the delivery of a biased court decision are criminalised:

– Article 434-7-1 of the French Criminal Code - malicious refusal to administer justice after receiving a relevant procedural request;

– § 339 of the German Criminal Code - a violation of justice, namely the refusal to consider a case or to make a decision in favour or to the detriment of one of the parties to the proceedings, committed by a judge, other official or arbitrator.

For example, the Spanish Criminal Code provides for several offences that may be committed by judges: rendering an unlawful sentence or decision (Article 446); rendering a manifestly unlawful sentence or decision through gross negligence or inexcusable ignorance (Article 447); refusing to render a sentence or decision without a legitimate reason or on the pretext of alleged ambiguity, insufficiency of

the law or a gap in the law (Article 448); maliciously delaying justice to achieve any unlawful purpose (Article 449).

Criminal liability for intentional acts committed by judges in the performance of their functions is also provided for in Article 243 of the Criminal Code of Serbia, part four of Article 294 of the Criminal Code of Bulgaria, § 146, § 148 of the Criminal Code of Denmark, Article 311 of the Estonian Penitentiary Code, Articles 291-293 of the Criminal Code of Latvia [8].

By examining the content of the verdict of the Leninsky District Court of Zaporizhzhia regarding the judge's deliberately unjust rulings made for selfish motives or in other personal interests, and the adoption of a deliberately illegal decision to impose a preventive measure in the form of detention, house arrest, committed in other personal interests, one can see a detailed analysis of the relevant issues [1]. In pursuit of his criminal direct intent aimed at the judge's deliberately unjust rulings and the imposition of deliberately illegal house arrest and detention on the participants of a peaceful protest, the investigating judge of the Babushkinsky District Court of the city of Dnipro, PERSON_4, in other personal interests which were expressed in the desire to satisfy his sense of self-importance and show his loyalty to the government in power at the time and thus gain advantages for his election to an administrative position in the court, knowing for certain, based on the materials of the petitions examined in the court hearing, that the detention of the participants of the peaceful protest was carried out in violation of the requirements of part 1 of Article 208 of the Criminal Procedure Code of Ukraine, without sufficient evidence of risks that would give any reason to believe that they may commit actions under Part 1 of Article 177 of the Criminal Procedure Code, and without the presence in the criminal proceedings of a reasonable suspicion of a criminal offence.

The judges, referring to the materials of the criminal proceedings, witnesses' testimonies, case law of the Constitutional Court of Ukraine, the Supreme Court and the European Court of Human Rights, found Judge PERSON_5 not guilty of committing a criminal offence. In the judgement of the European Court in the case of *Vassilios Stavropolous v. Greece*, the Court held that on the basis of the principle of "in dubio pro reo" (doubts are interpreted in favour of the defendant), which is a particular expression of the principle of presumption of innocence, there should be no qualitative difference between an acquittal due to lack of evidence and an acquittal due to the statement of the person's undoubted innocence. In fact, acquittals do not differ depending on the grounds taken into account in each individual case by the judge in criminal proceedings. In accordance with Article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.

Particular attention should be paid to a clear definition of the subject matter of this crime, first of all, there is a need for a clear interpretation of the concept of "unjust", which is an evaluative concept.

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