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AUTHORITIES AUTHORISED TO CONSIDER DISCIPLINARY PROCEEDINGS AGAINST JUDGES: COMPARATIVE LEGAL ANALYSIS

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Gordieiev V.V., Bzova L.G. Authorities authorised to consider disciplinary proceedings against judges: a comparative legal analysis.

Disciplinary liability is the main form of control over judges in European countries. The article analyses the procedural and legal status of bodies authorised to consider disciplinary complaints regarding the activities of judges in various European countries. It highlights the practice of the European Court of Human Rights and the Court of Justice of the European Union. Some countries provide guarantees of independence for all institutions after the initial stage, including the investigating body and the decision-making body. Other countries point to certain risks of a particular form of politicisation of the judiciary.

Some council systems have an appeal procedure before the Council of Judges. In contrast, in others, appeals are lodged with a higher court or the constitutional Court in certain circumstances. In several countries, court presidents can take disciplinary decisions in cases of warnings or a greater number of minor reprimands. In several countries, disciplinary proceedings are heard by a parliamentary committee on judicial discipline, the chief judge, the head of the appeals division, or a government disciplinary council for senior officials. In other cases, the ombudsperson and the chancellor of justice may initiate disciplinary proceedings.

In most countries, there are guarantees to protect the independence and impartiality of institutions involved in disciplinary proceedings, particularly the decision-making body. The disciplinary responsibility of judges is important for ensuring the proper administration of justice in accordance with the rule of law and is necessary to maintain confidence in the judiciary.

The procedural bodies involved in disciplinary proceedings must respect the separation of powers and the proper administration of justice. The disciplinary regime for magistrates is undoubtedly an area where we are witnessing a marked and rapid evolution of legal systems. Everyone knows the inadequacy of disciplinary control exercised over judges. All emphasize the necessary transparency of prosecutions and disciplinary decisions, the guarantee of trust in the judicial institution.

Key words: disciplinary liability, judge, High Council of Justice, Court of Justice of the European Union, European Court of Human Rights, disciplinary proceedings, rule of law, principle of proportionality.

Гордєєв В.В., Бзова Л.Г. Органи, які уповноважені розглядати дисциплінарні провадження щодо судді: порівняльно-правовий аналіз.

Дисциплінарна відповідальність є основною формою контролю за суддями в європейських державах. У статті проведено аналіз процесуально-правового статусу органів, які уповноважені

розглядати дисциплінарні скарги щодо діяльності судді у різних європейських країнах, а також висвітлено практику Європейського суду з прав людини та Суду ЄС. У деяких країнах передбачено гарантії незалежності всіх інституцій після початкової стадії, включно з органом розслідування та органом, що приймає рішення. В інших країнах вказують на певні ризики певної форми політизації судочинства.

У деяких системах рад існує процедура оскарження у Раді суддів, в інших апеляція надходить до вищого суду, навіть до конституційного суду за певних обставин. У кількох країнах голови судів наділені повноваженнями приймати дисциплінарні рішення у випадках попереджень або більшої кількості незначних доган. У кількох країнах дисциплінарне провадження розглядається парламентським комітетом із судової дисципліни, головним суддею, відповідно головою апеляційного відділу, або урядовою дисциплінарною радою для вищих посадових осіб. У деяких інших випадках омбудсмен і канцлер юстиції можуть ініціювати дисциплінарне провадження.

У переважній більшості країн існують гарантії захисту незалежності та неупередженості установ, залучених до дисциплінарного провадження, зокрема органу, який приймає рішення. Дисциплінарна відповідальність суддів є важливою для забезпечення належного здійснення правосуддя відповідно до верховенства права та необхідною для підтримки довіри до судової влади.

Процесуальні органи, залучені до дисциплінарного провадження, повинні поважати поділ влади та належне здійснення правосуддя. Дисциплінарний режим для суддів, безсумнівно, є сферою, де спостерігаємо помітну та швидку еволюцію правових систем. Усім відома неадекватність дисциплінарного контролю, який здійснюється за суддями. Усі підкреслюють необхідну прозорість судових переслідувань і дисциплінарних рішень, гарантію довіри до судової установи.

Ключові слова: дисциплінарна відповідальність, суддя, Вища рада правосуддя, Суд ЄС, Європейський суд з прав людини, дисциплінарне провадження, верховенство права, принцип пропорційності.

Statement of the problem. The disciplinary regime for judges who can apply EU law must provide the necessary safeguards to avoid the risk of this system being used as a tool for political control over their activities. Disciplinary proceedings against judges are an important mechanism for ensuring the integrity and trustworthiness of the judiciary. It investigates and punishes misconduct, ensuring that judges act according to ethical and legal principles. Therefore, the issue of examining the legal status of bodies authorised to conduct disciplinary proceedings against judges is a highly relevant topic for research.

The study aims to examine the procedural and legal status of bodies authorized to consider disciplinary proceedings against judges and to examine the practice of European countries.

Degree of scientific research. The study of the legal institute of disciplinary liability of a judge and the bodies authorized to consider disciplinary proceedings against a judge was covered in the works of the following scientists: L. Vynogradova, S. Herasymchuk, S. Rabinovych, S. Podkopaeva, M. Khavronyuk, and others. The empirical basis of the study is the practice of the European Court of Human Rights and the Court of Justice of the EU.

Presentation of the primary material. The legal responsibility of a judge is the ability of a judge to report to himself, the judiciary, the qualification commission, the High Council of Justice for the results of his professional activity and compliance with moral standards and to receive positive or negative assessments of his activities with the application, if necessary, of appropriate sanctions for improper behavior [7, p. 23].

In the legal literature, disciplinary liability is usually understood as strict compliance with the norms and orders based on them adopted in the country. Disciplinary liability is associated with an employee's non-fulfillment or improper performance of duties. Increasing the level of public trust in the judicial system should contribute to effective mechanisms of responsibility of judges for non-compliance and violation of the law, as well as ethical requirements for the position. However, when applying disciplinary liability to a judge, the nature of the offense committed and the judge's personality should be considered [8].

Disciplinary proceedings against judges should be based on the rule of law and conducted in accordance with certain fundamental principles aimed at ensuring the independence of the judiciary. International standards and case law of regional courts and independent advisory bodies provide that:

- a) disciplinary proceedings must be provided for by law;
- b) conduct that may lead to disciplinary liability must be clearly defined by law;

- (c) An independent body or tribunal should decide disciplinary proceedings;
- (d) Disciplinary proceedings must provide due process safeguards to the judge concerned, and the decision of the disciplinary body must be reasonable and subject to review by a higher judicial authority;
- e) sanctions must be determined in advance by law, and their imposition must be subject to the principle of proportionality [5].

The authority to take disciplinary measures against judges should be given to an independent judicial authority. The «natural judge» principle requires that the disciplinary body be established by law. The creation of a special disciplinary council, which is formed in each specific case, cannot be considered a decision compatible with the institutional independence of the judiciary [5].

Some standards explicitly stipulate that the disciplinary body should consist mainly of judges elected by their colleagues. In order to prevent accusations of corporatism and to ensure a fair disciplinary procedure, the disciplinary body should also include members who are not representatives of the legal profession, but under no circumstances should these persons be members of the legislative or executive branch of government [6].

In order to determine whether a tribunal or disciplinary body can be considered «independent», regional human rights courts have ruled that it is necessary to take into account, among other things, the manner in which the members of the body are appointed, the duration of their powers, the existence of safeguards against external pressure, and whether the body creates the appearance of independence [5]. For example, in the case of «Oleksandr Volkov v. Ukraine» [12], the applicant complained about violating his rights under the Convention during his dismissal from the post of judge of the Supreme Court of Ukraine. In particular, he argued under Article 6 of the Convention that: (i) his case had not been examined by an «independent and impartial tribunal»; (ii) the proceedings before the High Council of Justice (hereinafter referred to as the HCJ) were unfair due to the fact that they were not conducted in accordance with the procedure provided for by national law, which enshrines a number of important procedural safeguards, including the timing of the application of disciplinary sanctions; (iii) the Verkhovna Rada of Ukraine decided to dismiss him at the plenary session in violation of the rules for using the electronic voting system; (iv) his case has not been heard by a «court established by law»; (v) the decisions in his case were made without a proper assessment of the evidence, and the important arguments put forward by the defence were not adequately considered; (vi) the lack of sufficient powers of the Supreme Administrative Court of Ukraine to review acts adopted by the HCJ was contrary to its «right to a trial»; (vii) the principle of equality of the parties was not observed. The applicant also complained that his dismissal did not comply with Article 8 of the Convention and that he had no effective remedy in this regard, contrary to Article 13. The European Court of Human Rights found that the composition of the High Council of Justice (which consisted mainly of non-judicial members appointed directly by the executive and legislative branches, with the Minister of Justice and the Prosecutor General being ex officio members of the Council) revealed several structural deficiencies that undermined the requirements of independence and impartiality, violating paragraph 1 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms [5].

In a previous judgment on the independence of the Disciplinary Chamber of the Polish Supreme Court, the Court of Justice of the European Union ruled that national courts applying European Union law are obliged to ignore the provisions of national law conferring jurisdiction on a body that does not meet the requirements of independence or impartiality required by EU law [3]. On April 8, 2020, the Grand Chamber of the Court of Justice of the European Union issued an interim measure obliging Poland to immediately suspend the application of national provisions concerning the powers of the Disciplinary Chamber of the Supreme Court in disciplinary cases against judges [1].

National practice regarding the body composition responsible for resolving disciplinary proceedings against judges varies from country to country. In some countries, the judiciary retains the power to hear disciplinary cases; in others, this power is vested in an independent body, usually the Judicial Council. In some countries, members of the executive branch, usually the Ministry of Justice, formally appoint members of the disciplinary body or participate in disciplinary proceedings as ex officio members of the disciplinary body. In common law jurisdictions, disciplinary bodies still usually submit their recommendations for dismissing a judge to the head of state, who is responsible for the official act of dismissal [2].

Disciplinary proceedings against a judge are carried out by the disciplinary chambers of the High Council of Justice in accordance with the procedure established by the Law of Ukraine «On the High Council of Justice» [10].

The High Council of Justice is a collegial, independent constitutional body of state power and judicial governance, which operates in Ukraine permanently to ensure the independence of the judiciary, its functioning based on responsibility, accountability to society, the formation of a virtuous and highly professional corps of judges, compliance with the norms of the Constitution and laws of Ukraine, as well as professional ethics in the activities of judges and prosecutors [9].

The High Council of (Justice: 1) submits a motion to appoint a judge to the position.

2) decide on the violation of incompatibility requirements by a judge or prosecutor; 3) ensures that the disciplinary body conducts disciplinary proceedings against a judge; 4) form bodies for consideration of cases on disciplinary liability of judges; 5) consider complaints against the decisions of the relevant authorities to bring a judge or prosecutor to disciplinary responsibility; 6) make a decision on the dismissal of a judge from office; 7) agrees to the detention of a judge or his detention or arrest; 8) make a decision on the temporary suspension of a judge from the administration of justice; 9) take measures to ensure the authority of justice and the independence of judges; 10) make a decision on the transfer of a judge from one Court to another, a decision on the secondment of a judge to another court of the same level and specialization; 11) decides to terminate the resignation of a judge, etc. [9].

In Romania, a party to several criminal proceedings filed disciplinary complaints with the competent judicial inspectorate against some judges and prosecutors involved in the case. The party then appealed to the High Court of Bucharest with a request to challenge this archive, arguing, in particular, that disciplinary proceedings were impossible due to the concentration of powers in the hands of the Chief Inspector. According to this party, such a concentration of powers contradicts EU law.

The High Court of Bucharest referred this issue to the Court of Justice of the EU.

In its judgment of May 18, 2021, the Court reiterates its case-law [4], according to which, although the organisation of the administration of justice falls within the competence of the Member States, the exercise of this power must be in accordance with Union law. Accordingly, the disciplinary regime applicable to judges who may be forced to apply EU law should provide the necessary safeguards to avoid any risk of using this regime as an instrument of political control over their activities.

Therefore, the rules governing the organization and functioning of the body competent to conduct disciplinary investigations and initiate disciplinary proceedings against judges and prosecutors must comply with the requirements arising from EU law, particularly the rule of law.

In order to ascertain whether this is the case in the present case, the Court notes that it is for the High Tribunal of Bucharest to assess Romanian law as such and in its domestic legal and factual context [4].

Regarding the relevant factors for this review, the Court observes that, under Romanian law, disciplinary measures to punish violations committed by the Chief Inspector can only be brought by an inspector whose career depends mainly on the decisions of the Chief Inspector. In addition, decisions regarding the Chief Inspector may be reviewed by the Deputy Chief Inspector, who has been appointed by the Chief Inspector and whose term of office expires simultaneously with the term of office of the Chief Inspector. Without prejudice to the inspections to be carried out by the High Court of Bucharest, it can be seen that such a disciplinary regime in practice is capable of hindering the effective execution of disciplinary proceedings against the Chief Inspector, even if he is the subject of substantiated complaints [4].

Indeed, the closure of a complaint against the Chief Inspector may be the subject of an appeal, which may lead, where appropriate, to the annulment of the decision to close the case. However, it is for the Bucharest Court of First Instance to assess to what extent the powers enjoyed by the Romanian courts in that regard allow for the effective conduct of disciplinary proceedings against the Chief Inspector and the practical and impartial examination of complaints against him [4].

In that regard, the Court notes that, if that Court were to conclude that the actions of the Chief Inspector could not be subject to real and practical review in the context of the legislation at issue in the main proceedings, it would have to be accepted that that legislation was not drafted in such a way as to leave no legitimate doubt in the minds of the parties to the proceedings as to the use of the prerogatives and functions of the Judicial Inspection as an instrument of pressure on judicial activity or of political control over that activity [4].

Regarding the national legal and factual context, the powers of the Inspector General have been strengthened in the broader context of reforms of the organisation of the Romanian judicial system, which aim to reduce the guarantees of independence and impartiality of Romanian judges. Furthermore, the Inspector General is closely linked to the executive or legislative branches of government. Finally,

it is necessary to consider the specific practices followed by the Inspector General in the exercise of his prerogatives, which may be used for political control over judicial activity [4].

Therefore, without prejudice to the conclusions that are the subject of the consideration of the High Court of Bucharest, it appears that the elements of the legal and factual context to which the Court's attention is drawn are intended to confirm, rather than to refute, any conclusion that the legislation in question is not designed in such a way as not to raise any legitimate doubts in the minds of individuals as to the use of the prerogatives and functions of the Judicial Inspection as an instrument of pressure on judicial activity or of political control over said activity [4].

Conclusions. This judgment is of fundamental importance for the EU legal order, since it analyses for the first time the legal nature and effects of key EU instruments used to ensure the accession of new Member States to the EU and to monitor the rule of law. In short, disciplinary proceedings against magistrates are a vital tool for maintaining the integrity and effectiveness of the judiciary, balancing the need for judicial accountability with the protection of their fundamental rights.

Thus, there is a need to create a mechanism for bringing judges to disciplinary responsibility. The law has introduced a number of improvements. In particular, it expands the circle of entities that can file complaints and clearly stipulates the obligation to justify in writing any refusal by the judicial inspectorate, provisions on the stages of disciplinary proceedings and the rights and obligations of the parties involved, improvements to the components of certain disciplinary offences, expansion of the range and regulation of the consequences of disciplinary sanctions, and an increase in the period of disciplinary liability.

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