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NOTE

Legal regulation of the prevention of abuse of the procedure of disciplinary complaint against a judge – national practice in Spain and Italy

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1. This note is prepared in the framework of the Council of Europe project “Support to the functioning of justice in the war and post-war context in Ukraine”, on request of the Ukrainian Parliamentary Committee on Legal Policy.

2. The note is prepared by Lorena Bachmaier Winter, international consultant of the Council of Europe, with regard to the legal regulation of the prevention of abuse of the procedure of disciplinary complaint against a judge in Spain and Italy and answers the following questions:
1) Does the national legislation of the member States of the Council of Europe prohibit or prevent the abuse of the right to file a disciplinary complaint against a judge?
2) What are the respective mechanisms or legal procedures that allow the bodies authorised to conduct disciplinary proceedings against a judge to prevent or cease this type of abuse?
3) Can the respective authorities, in case of the abuse of the right to file the respective complaint, restrict or impose certain conditions on the use of such right by the complainant in question?

3. The Ukrainian legislation stipulates that it is prohibited to abuse the right to apply to the body authorised to conduct disciplinary proceedings including initiating the issue of judicial liability without sufficient grounds established by law. The use of this right as a means of pressure on a judge with regard to his/her administration of justice (Article 107 § 4 of the Law of Ukraine "On the Judiciary and Status of Judges"). At the same time, Ukrainian legislation does not provide for any mechanisms or instruments that would allow the body authorised to conduct disciplinary proceedings against a judge to respond to such cases, stop them, or prevent them.

I. Introduction

Preventing abuses in filing ungrounded claims before the courts or before an administrative body such a judicial disciplinary commission, is a major challenge faced by any justice system. There are three options:1) allow the free access by the claimants and not filtering the claims, except those manifestly ill-founded, and not imposing sanctions to the claimant, except the costs for losing the procedure once the claims are rejected; or 2) prevent that eventually abusive conducts by claimants filing repetitive ungrounded claims –that could amount to a “judicial harassment”– are handled up to a final decision, by introducing an admissibility check which shall filter those which lack any motivation, but without sanctioning the claimant for its abusive filing of complaints, except via the costs of the proceedings; or 3) add to option 2) an additional sanction –administrative or even criminal– for abusing the system, a sanction that should discourage the filing of clearly unfounded complaints.

Each of the options presents advantages as well as shortcomings, and thus the solution needs to take into account the context where the rule preventing abusive complaints is to be applied. In addition, the normative solution shall take into account whether the abusive filing of complaints stem from the same complainant or not.

Since every justice system is confronted with the need to deal with abusive complaints/complainants –albeit with different intensity and consequences–, this note is going to present how two legal systems face it. The note is limited to addressing the issue of abusive complaints filed against judges in disciplinary proceedings, although where no specific rules for these proceedings exist, reference will be made to the general rules applicable to ordinary administrative proceedings. A strict comparison to the Ukrainian system might not be established, since the requirements for filing such complaints and the procedural steps regulated in the law might lead to different approaches as well as results. For example, in a

system where there is a mandatory intervention of a lawyer to present a disciplinary complaint against a judge, the reaction against an eventually abusive behaviour shall be treated completely different to a system where no lawyer is required to present such a complaint.

II. Questions

1. Does the national legislation of the member States of the Council of Europe prohibit or prevent the abuse of the right to file a disciplinary complaint against a judge?

Spain: No.
The Spanish system has opted for an "open system" allowing any citizen to report about misconducts of judges that might entail disciplinary liability on a very flexible and informal way. Rather than a form of complaint the system is based on a very accessible reporting system. The report can be presented in paper in a post box, accessible to any citizen or online, by way of the General Council of the Judiciary webpage. Obviously, such a broad system results in a considerable high number of completely ungrounded reports. The reports are filtered by an administrative body, discarded those which are unrelated to the judicial liability, or affect other administrative bodies.
This system has the advantage that it encourages citizens to report misconducts, without fear of retaliation. On the other side, it entails a high cost and a considerable amount of resources to go through all the reports and select/filter those that might have any relevance for the judiciary and eventual disciplinary liability. Thus, this system does not prevent abusive reports, however, since they are not complaints it does not require the involvement of the judge, until the reports pass the filter and it reaches the office of the disciplinary promoter.
3 judges and 10 administrative staff deal with these "reports", which do not require any formality nor involvement of legal counsel.
Once the first filtering has taken place, those who might entail any disciplinary liability against a judge are handed over to the disciplinary commission, to decide whether the investigation should be triggered or not. The same approach is taken here as with regard to criminal proceedings (mutatis mutandis).

In sum, the system does not prevent abuses of the right to file a disciplinary report. This causes additional work in filtering those reports, but since it is not a formal complaint, the reputation of the judge is not affected. At this stage, the judge does not have to take any action to defend himself, since the report can be discarded already by the receiving office for being completely ill-founded in the sense, that it does not indicate any reasons that might entail disciplinary liability. There is a huge number of reports where citizens simply complaint because the judgment did not satisfy them. However, since the merits of the judgments and decisions are not subject to any disciplinary review, they are rejected straight away.
The Spanish system has opted for opening the channel for gathering all kind of information related to malfunctioning of the court system, including eventual judicial disciplinary liability, with the drawback that it entails costs and workload in dealing with those reports. If they are not anonymous, the reporting person will get an e-mail notification of the destiny of the report (sent to another administrative unit, not acceptable, etc.). This is not a judicial decision, thus there is no appeal against it.

Italy:

The system of disciplinary liability of judges of Italy presents certain features that make it quite different from others. According to the Legislative Decree of 3 February 2006, n. 109 "On disciplinary offenses of magistrates, related sanctions and the procedure for their applicability, as well as modification of the regulations regarding incompatibility, exemption from service and transfer of office of magistrates, pursuant to article 1, paragraph 1, letter f), of law 25 July 2005, n. 150",[1] the disciplinary proceedings can only be triggered by action of the General Public Prosecutor of the Supreme Court. Thus, there are no private claimants with standing in the disciplinary proceedings, resembling in this sense the system of Spain.
As stated in a prior study[2] the citizens can only report to the relevant bodies about possible misconducts of judges, and if those reports present facts that might entail disciplinary liability, the Public Prosecutor at the Supreme Court, must open the investigation. In addition, the rules provide that any judicial office –including the same HCJ– have the obligation to notify to the General Public Prosecutor of the Supreme Court any news that might entail disciplinary liability of a judge.
This is provided under Article 14 of the Legislative Decree (On the power to file a disciplinary complaint (*Titolaritá dell'azione disciplinarie*):

"*4. The Superior Council of the Judiciary, the judicial councils and the managers of the offices have the obligation to communicate to the Minister of Justice and the General Public Prosecutor at the Court of Cassation any fact relevant from a disciplinary point of view. The presidents of the section and the presidents of the chambers as well as the assistant prosecutors must communicate to the managers of the offices the facts concerning the activity of the magistrates of the section or of the tribunals or of the office that are relevant from a disciplinary point of view.*"

The Italian system, which is based on the monopoly of the highest prosecutor of the Supreme Court to trigger disciplinary proceedings against judges, follows a similar pattern as the criminal procedure. The vast powers of the public prosecutor are balanced by the lack of discretionary powers to decide on the prosecution/disciplinary action against a judge. This system is only reasonable in a context where the public prosecution enjoys, as is the case in Italy, an independent status: public prosecutors enjoy almost the same degree of independence as the judges.

2. What are the respective mechanisms or legal procedures that allow the bodies authorised to conduct disciplinary proceedings against a judge to prevent or cease this type of abuse?

Spain:
There are no specific rules within the disciplinary sanctioning proceedings against judges. Thus, the general rules for administrative proceedings apply. With regard to the consequences of the abusive exercise of subjective rights through administrative means I must begin by stating that the Spanish administrative procedure does not foresee a specific reaction directed

[1] DECRETO LEGISLATIVO 23 febbraio 2006, n. 109Disciplina degli illeciti disciplinari dei magistrati, delle relative sanzioni e della procedura per la loro applicabilità, nonchè modifica della disciplina in tema di incompatibilità, dispensa dal servizio e trasferimento di ufficio dei magistrati, a norma dell'articolo 1, comma 1, lettera f), della legge 25 luglio 2005, n. 150.

[2] See the Council of Europe Report "On certain Aspects on the Role of The Councils of the Judiciary in Disciplinary Proceedings Against Judges and Compliance With Fair Trial Rights, of October 2022, prepared by Lorena Bachmaier Winter, within the Project "Ensuring the effective implementation of the right to a fair trial (Article 6 of the ECHR) in Ukraine", accessible at: https://rm.coe.int/comparative-study-hcj-and-disciplinary-proceedings/1680aa8e2a

against those actions of the citizen that could be classified as abusive towards the Administration.
Various mechanisms or consequences can be thought of. The usual "sanction" takes place by way of imposing the costs of the procedure, which can have also a punitive nature if the claim is considered as manifestly ill-founded or abusive. However, such reaction might have a slight deterrence effect, but does not have any effect in cases where the claimant is insolvent. And to claim the costs entails another additional workload for the judicial system.
The most appropriate reaction to the abusive exercise of rights (petitions, claims,e tc.) seems to be its refusal. However, in the Spanish judicial disciplinary system there is no provision in this regard nor does it exist in the general administrative proceedings to refuse ab initio abusive claims, but only once they have been admitted and after a summary analysis of its foundation (article 89.4 of Law 30/1992, of November 26 (on the legal regime of Public Administrations and the Common Administrative Procedure):

"In no case may the Administration refrain from resolving under the pretext of silence, obscurity or insufficiency of the legal provisions applicable to the case, although it may resolve the inadmissibility of requests for recognition of rights not provided for in the Legal System or manifestly."

This can be applied *mutatis mutandis* to the disciplinary proceedings against judges.

Italy:
There cannot be any abusive claims for disciplinary infringements against judges, since the Head of the Public Prosecutor at the Supreme Court is the only one who has standing to trigger the disciplinary proceedings. Since the disciplinary proceedings follow the same principles (mutatis mutandis) as the criminal procedure, where the criminal action is also a monopoly of the public prosecution, the citizens play a minor role in the disciplinary proceedings. Their role is limited to reporting about the possible offence (as in criminal proceedings). The admissibility of the report, and the decision to activate the investigation against a judge for a disciplinary offence, lies exclusively in the hands of the Head of the Public Prosecution Office of the Supreme Court.

3. Can the respective authorities, in case of the abuse of the right to file the respective complaint, restrict or impose certain conditions on the use of such right by the complainant in question?

Spain: No. This is a problem, since this leads to an extremely high number of reports/claims. However, since the claimant does not have a subjective right to have the claim processed, the whole system is simplified.

Italy: Since the power to trigger disciplinary proceedings lies exclusively with the Head of the Public Prosecution Office of the Supreme Court, there is no chance for abusive claims by citizens against judges. There might be an issue regarding abusive reports filed by the citizens. False reporting of a crime might be sanctioned as a criminal offence, but it is unclear if this applies also to the false reporting of a disciplinary offence by a judge. The judge will only be involved and required to defend him/herself, once the disciplinary investigation has been triggered. Thus, the abusive reporting will not even bother him/her.
Taking into account the statistics (only 1393 reports in a period of 4 years), it seems that abusive reporting against judges is not a problem in Italy.

III. Dealing with abusive judicial disciplinary complaints in Ukraine

Following Article 107 of the Ukrainian Law, anyone can file a disciplinary complaint against a judge, either personally or represented by lawyer (mandatory lawyer in case of legal persons and the representatives in case of public offices. In addition, the claim has to be signed, and anonymous complaints are not accepted as a rule (Article 107.6).
Thus, this complaint is similar to a judicial complaint, conferring rights to the claimant (right to be informed, right to appeal the inadmissibility, etc.). The manifestly ill-founded claim, may also entail a sanction against the lawyer, for abusive exercise of rights.
Since this regime is completely different to the one described regarding the Spanish system, no analogy can be traced there, and the solutions applied to the Spanish system cannot be transferred or inspire the Ukrainian judicial disciplinary procedure.
The approach towards the prevention of abusive exercise of the right to complain in the Ukrainian setting to avoid that the lawyers are "harassed" by abusive claims against them, would require to apply rules that are foreseen in other systems for abuse of procedural rights in the civil or administrative procedure, as well as rules applied by the Bar.
First, in the Spanish system, in cases of manifestly abuse of process when a lawyer is acting in the proceedings, the Spanish Code of Civil Procedure provides for consequences in case of acting without respect to the principle of good faith. This is the relevant provision:

Article 247 Respect for the rules of procedural good faith. Fines for non-compliance

"1. Those involved in all types of processes must comply with the rules of good faith in their actions.

2. The courts will reject petitions and incidents that are formulated with manifest abuse of rights or involve fraud of law or procedure.

3. If the Courts consider that any of the parties has acted in violation of the rules of procedural good faith, they may impose, in a separate piece, by reasoned agreement, and respecting the principle of proportionality, a fine that may range from one hundred and eighty to six thousand euros, without in any case exceeding one third of the amount of the dispute.

To determine the amount of the fine, the Court must take into account the circumstances of the event in question, as well as the damages that may have been caused to the procedure or to the other party.

In any case, the Lawyer of the Administration of Justice will record the fact that motivates the corrective action, the allegations of the person involved and the agreement adopted by the Judge or Chamber."

Since the Code of Civil Procedure acts as general rule and its provisions apply whenever there is need to fill a gap in another jurisdictional order, in principle, this rule applies to all proceedings.

The second approach, which is common in all legal systems is to resort to the control of bad faith or abusive behaviours of lawyers, by the Bar. Ethical principles are to be respected by the lawyers, and infringements of the Code of Ethics should be dealt with by the Bar Association. If this is not functioning correctly in the relevant setting, the option for dealing with abusive claims could be:

1) Provide for a consequence similar to the one foreseen under Spanish law (article 247 Civil Code of Procedure).

2) Increase the costs of the proceedings in case of rejection for manifestly ill-founded claims.

3) If the abusive exercise of these claims seeks to damage the reputation of the judge, by making public the filing of the claims (even if these are being rejected straight away), the HCJ should seek to support an action for civil damages filed by the judge. This should be a last resort solution, as it takes time and could be useless if the claimant is insolvent.

4) In extreme cases, where the same party has filed numerous repetitive claims (and a lawyer, not fearing the reaction by the Bar Association), has signed them, it might be also considered to request prior to the acceptance of the claim, a deposit to respond for the potential costs and damages. This should only be considered as an exceptional and last resort measure.