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REPORT

On the system of disciplinary proceedings and liability of judges in Ukraine

June 2023

This analysis is prepared in the framework of the project "Ensuring the effective implementation of the right to a fair trial (Article 6 of the ECHR) in Ukraine" which is funded by the Human Rights Trust Fund and implemented by Council of Europe's Division of Co-operation Programmes

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List of abbreviations

CCJE	Consultative Council of European Judges
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR (or the Court)	European Court of Human Rights
GC	Grand Chamber
HCJ	High Council of Justice
LAJ	Law on Administrative Jurisdiction
LJ	Law on the Judiciary and Status of Judges
LHJC	Law High Council of Justice
MoJ	Ministry of Justice
para.	paragraph
PPO	Public Prosecutor's Office
UAC	Ukrainian Constitution

Executive summary

This report is focused on the rules on disciplinary offences and sanctions in the Ukrainian Law of the Judiciary and Status of Judges (further – LJ), to provide guidance to the High Council of Justice (further – HCJ) as to its application and interpretation, as well as to recommend legislative amendments when this is considered necessary or highly convenient.

The grounds for taking disciplinary action against judges in Ukraine are regulated under Article 106 LJ. This lengthy provision lists 19 disciplinary offences, both dealing with professional exercise, as well as with non-professional or out of court conducts. Many of the provisions are devoted to establishing liability related to the prevention of corruption and non-compliance with integrity checks, as for example not presenting information about the assets. In general, the rules on disciplinary sanctions and offences include a gradation of the offences and the corresponding sanction to each type of offence.

The description of certain disciplinary offences in the LJ can be deemed to be vague and too broad and there is no clear differentiation between ethics and disciplinary proceedings in the definition of some disciplinary offences. Certain amendments should be introduced in Article 106 LJ, where in some paragraphs the absence of a legal specification confers insecurity to the system and poses an undue threat for judges. In general, more clarity in the drafting of the offences is advised.

Principle VI.2 of Recommendation of the Committee of Ministers No. R (94) 12 might be thought to suggest that precise grounds for disciplinary proceedings should always "be defined" in advance "in precise terms by the law". The Consultative Council of European Judges (CCJE) establishes that precise reasons must be given for any disciplinary action, as and when it is proposed or when it is carried out. However, the CCJE does not conceive it to be necessary or even possible at the European level to seek to define all such potential reasons in advance in other terms than the general formulations currently adopted in most European countries.

However, the description of the disciplinary infringements in the Ukrainian LJ could be refined and the rules on imposing sanctions could be spelt out further so that the capacity of the HCJ could be improved and the system enhanced in the line with Council of Europe standards. Precisely, resorting to the breach of general ethical standards as a ground for disciplinary liability should be avoided.

In assessing the breach of conduct and, thus, the disciplinary offense of undue delays in performing the judicial tasks, the workload of each judge shall be determined so that a manifest deviation from such clearance rate could be identified easily, and it could be determined consequently whether the relevant judge is to be held responsible for it.

As to the rules on disciplinary sanctions, which are mainly provided in Article 109 LJ, it contains different types of sanctions which can be adjusted to the gravity of the infringement. In general, the sanctions foreseen are very similar to those of other countries. However, the sanctioning system leaves a too broad leeway to the disciplinary body to select the sanction, which increases the risk of arbitrariness, as well as the imposing of disproportionate sanctions. The lack of certainty and foreseeability of the type of sanction that might be imposed for each of the administrative offences is not advisable and should be corrected.

Following the requests of the Ukrainian authorities, further issues that have been analysed in this report, include the possibility of initiating disciplinary proceedings ex-officio by the High Council of Justice, the rights of the complainants, and the scope of the judicial remedies.

1. Introduction

1. The report on the system of disciplinary proceedings and liability of judges in Ukraine was prepared in the framework of activities of the project "Ensuring the effective implementation of the right to a fair trial (Article 6 of the ECHR) in Ukraine", which is financed by the Human Rights Trust Fund and implemented by the Council of Europe. The report was prepared by Ms Lorena Bachmaier-Winter[1], who declares to adhere to the general methodological principles of impartiality, objectivity, and confidentiality, and that she is not under any situation of conflict of interest.

2. The report is mainly based upon desk research, analysing first the Ukrainian legal framework, mainly the Law on the Judiciary and Status of Judges (further – LJ) and the Law on the High Council of Justice (further – LHCJ). However, to identify pressing needs and practical problems two meetings were held online to discuss this topic, the first with the members of the HCJ and the second with the judges of the Supreme Court. These two meetings were very useful to understand the precise areas where further guidance might be necessary. Both meetings were very fruitful since the Ukrainian stakeholders were very cooperative and open in explaining their concerns and showed a real interest in improving the current system. This is specially to be admired, taking into account the circumstances under which they are working in Kyiv. Also, the report was presented during a workshop on judicial self-governing bodies in Ukraine, which was held in Strasbourg on 16 June 2023

3. The aim of the present study is to carry out an analysis of the system of disciplinary proceedings and liability of judges in Ukraine to provide guidance to the Ukrainian authorities on European standards and best practices, considering the specific context of the Ukrainian judiciary and its self-governing bodies. The present analysis will be focused on the current problems faced by the disciplinary bodies against judges in Ukraine and the rules on disciplinary offences and sanctions, taking on board the findings of the comparative study carried out before.[2] It will address specific issues that have already been identified by the stakeholders as problematic or in need for further development.

4. Accountability is a key concept for the judicial independence, and a sound judicial system compliant with the rule of law requires that these two principles are adequately balanced. Disciplinary liability is necessary to ensure that of each of the serving judges complies correctly with their duties and do not overstep their vast powers, and on the other side the system of disciplinary liability requires to be structured in such a way to ensure that the accountability system is not used to impinge upon de judicial independence. As stated in a previous report[3], Ukraine has

[1] Lorena Bachmaier Winter is an international consultant of the Council of Europe and Full Professor of Law at the Complutense University in Madrid, Spain.

[2] This comparative study presented the rules and practice of the disciplinary system of judges in four countries which have a High Council of the Judiciary, namely Italy, Portugal, Slovenia and Spain. The study was prepared to help identifying eventual shortcomings in the Ukrainian disciplinary liability system of judges that could aid in identifying proposals for improvement.

[3] See the 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, accessible at: https://www.coe.int/en/web/kyiv/ensuring-the-effective-implementation-of-the-right-to-a-fair-trial-article-6-of-the-echr-in-ukraine#{%22197976294%22:[5]}. The report was presented to the members of the High Council of Justice of Ukraine on 27 February 2023, during an online session on 27 February 2023. While Ukrainian authorities and legislator have made great efforts in aligning the laws on the judiciary with the CoE standards and have been devoting special attention to finding the right balance

undertaken several legal reforms to regulate the disciplinary sanctioning system seeking such balance, by regulating in a detail way the disciplinary offences and sanctions, as well as the fair trial rights that are to be respected in the disciplinary proceedings against judges in compliance with Article 6 of the European Convention on Human Rights (ECHR) and the case-law of the European Court of Human Rights (ECtHR).

5. At present, the rules on disciplinary offences, disciplinary proceedings and disciplinary sanctions are set out in the Ukrainian Law on Judiciary and Status of Judges of 6 December 2019, amended on 31.10.2019, Section VII "Disciplinary Liability of a Judge (Articles 106-111), and subsequently amended several times since the declaration of martial law 24 February 2022.[4] According to its Article 108, the competent body to conduct disciplinary proceedings against a judge should be disciplinary chambers of the High Council of Justice within the procedure established by the Law of Ukraine On the High Council of Justice of 3 October 2017, last amended on 31.10.2019 (Articles 42-58).

6. Based on the feedback obtained from the members of the HCJ and the judges of the Supreme Court, it became evident that the following questions should be further studied, in order to advance towards the best solution in terms of efficiency, while respecting the standards regarding procedural safeguards under Article 6 ECHR as interpreted by the ECtHR. Some of those issues that were identified during the meetings were:

   1) Article 106 LJ: definition of disciplinary offences, overview of comparative approach, assessment of the grounds under Article 106 LJ.
   2) The possibility of ex-officio investigations on disciplinary misconducts by the HCJ. Possibility of a proactive conduct of the HCJ or need to wait until there is a formal complaint raised by a complainant.
   3) Rights of complainants, participation, right to appeal, right to know the reasons for rejecting their complaint.
   4) Criteria for selection of the members of the inspection service responsible for the disciplinary inquiry. The issue of the salary of the disciplinary inspectors.
   5) Disciplinary proceedings: standards of proof; how to proof *mens rea*, malicious conduct, intent; sources of evidence.

7. In addressing these topics, the following structure will be followed, as much as it is adequate:

   - legal framework;
   - institutional framework;
   - existing challenges;
   - proposed models and solutions;
   - recommendations.

8. This report will provide an overview of European standards and best practices that might shed light on the ways to improve the current legal framework and address some of the questions/issues raised during the meetings and identified as problematic. Some of those problems are directly linked to the situation of being Ukraine under martial law and the fact that many judges have joined the armed forces. Despite the difficult circumstances and the problems of administering justice

between the protection of judicial independence and accountability of individual judges, as it was manifest out of the discussion held on the past, there are still pressing issues that need to be addressed.

[4] See also the Law of Ukraine "On the Legal Regime of Martial Law" No. 389-VIII of 12.5.2015.

in wartime, the martial law does not suspend the judicial power, and thus courts must keep on working. Special amendments were approved after 24.2.2022, mainly on the territorial jurisdictions of courts, secondment of judges, meetings to be held remotely, powers of the Supreme Court in case of the HCJ not being able to take decisions, and thus special solutions for the special situation need also to be found.[5]

9. Since the previous study already contained the main case-law of the European Court on Human Rights on disciplinary proceedings against judges and the requirements of such proceedings under Article 6 ECHR, in the present report such standards will be reflected again only where it is necessary. In general, the prior study will be referred to, where the vast case-law of the ECtHR on disciplinary proceedings, requirements of the disciplinary body and the scope of the judicial remedy was reflected and analysed.

[5] The legislation does not regulate yet the procedure for mobilising judges, and there are no legal norms that would define the specifics of the work of judicial self-government bodies in conditions of martial law. See the "Outline of legislative amendments and specifics of the activity of judicial self-governance bodies of Ukraine during the martial law regime", prepared by Council of Europe, April 2023, and the list of amendments introduced in the Law on the Judiciary since 24 February 2022.

2. Standards of the Council of Europe and the Ukrainian legal framework

10. The Council of Europe standards on disciplinary liability of judges are to be found mainly in Recommendation of the Committee of Ministers of the Council of Europe (2010)12 "Judges: independence, efficiency and responsibilities", adopted by the Committee of Ministers of the Council of Europe on 17 November 2010. Paragraphs:

> *66. The interpretation of the law, assessment of facts or weighting of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability except in cases of malice and gross negligence.*
>
> *69. Disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner. Such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate.*
>
> *70. Judges should not be personally accountable where their decision is overruled or modified on appeal.*
>
> *71. When not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen.*

11. Also, Opinion No.3 (2002) of the CCJE "On ethics and responsibility of judges", adopted 19 November 2002 provides the main conclusions and principles on disciplinary liability of judges under para. 77:

> *i) in each country the statute or fundamental charter applicable to judges should define, as far as possible in specific terms, the failings that may give rise to disciplinary sanctions as well as the procedures to be followed;*
>
> *ii) as regard the institution of disciplinary proceedings, countries should envisage introducing a specific body or person with responsibility for receiving complaints, for obtaining the representations of the judge and for considering in their light whether or not there is a sufficient case against the judge to call for the initiation of such proceedings;*
>
> *iii) any disciplinary proceedings initiated should be determined by an independent authority or tribunal, operating a procedure guaranteeing full rights of defence;*
>
> *iv) when such authority or tribunal is not itself a court, then its members should be appointed by the independent authority (with substantial judicial representation chosen democratically by other judges) advocated by the CCJE in paragraph 46 of its Opinion N° 1 (2001);*
>
> *v) the arrangements regarding disciplinary proceedings in each country should be such as to allow an appeal from the initial disciplinary body (whether that is itself an authority, tribunal or court) to a court;*
>
> *vi) the sanctions available to such authority in a case of a proven misconduct should be defined, as far as possible in specific terms, by the statute or*

fundamental charter of judges, and should be applied in a proportionate manner.[6]

12. The current legal framework on disciplinary liability of judges in Ukraine is to be found in the Constitution of Ukraine, which contains the general principles and rules on judicial independence, mainly in Articles 126, 129 and 131 Ukrainian Constitution (UAC).

13. The main rules on disciplinary offences are provided under Section VI "Disciplinary Liability of the Judge" of the LJ, precisely Articles 106 -111.

14. As to the disciplinary proceedings, although in the LJ there are some provisions, they are to be found in the LHCJ, mainly under Section II (Special Part), in Chapter 4 "Disciplinary Proceedings Towards Judges", Chapter 5 "Appealing Decisions on Bringing the Judge or Prosecutor to Disciplinary Responsibility" and Chapter 6 "Removal from Office", covering Articles 42 to 57.[7]

15. This is the general legal framework, which shall be discussed and analysed in detail in the following paragraphs. Some of the provisions of the LHCJ and LJ have been affected by the Presidential Resolution "On the introduction of martial law in Ukraine", adopted on 24 February 2022. Since then and considering that under martial law the courts cannot be suspended and have to continue exercising their jurisdiction, several reforms were adopted to overcome problems related to the military occupation of the country – the need to transfer courts and the personal situation of several judges, as well as the contingencies that might arise when the HCJ is not capable of adopting decisions due to the lack of the number of its members required by the law.[8]

16. These amendments relate mainly on the possibility that certain powers of the HCJ were temporarily taken over by the President of the Supreme Court, the decisions on secondment of judges, the holding of remote judicial meetings, the provision of vacancies or the change of location of certain courts, or the change of their territorial jurisdiction for security reasons. Although these amendments could have a direct impact upon the powers of the judicial self-governing body, in principle the transfer of powers of the HCJ to other institutions or bodies should only be exercised "in case there are no authorised members of the HCJ". Therefore, this assessment on the system of disciplinary liability of judges will not delve into hypothetical situations that

[6] Further International standards are: the European Charter on the Statute for Judges and Explanatory Memorandum, DAJ / DOC (98) 23 (8-10 July 1998); The Magna Carta of Judges, adopted by the CCJE (2010) as the document 3 Final (17 November 2010).

[7] The description of the legal and institutional framework is kept here to a minimum, since they were fully described in the previous "Analysis of the national legislation and regulations regarding the selection and appointment of judges and disciplinary proceedings with the view of their optimisation and simplification in line with Council of Europe standards and best practices in a number of member States. Part II: Disciplinary Proceedings", prepared within the Council of Europe project "Support for judicial institutions and processes to strengthen access to justice in Ukraine", July, 2022.

[8] On the scope and content of such legal reforms, see the "Outline of legislative amendments and specifics of the activity of judicial self-governance bodies of Ukraine during the martial law regime", of April 2023 prepared within the Council of Europe Project "Ensuring the effective implementation of the right to a fair trial (Article 6 of the ECHR) in Ukraine", which is implemented by the Council of Europe Division of Co-operation Programmes, DG-I.

might arise in case the HCJ would not be able to perform their legally attributed functions within the disciplining of judges. In sum, the legal framework will be analysed from the point of view of a fully operative and functioning HCJ.

17. This opinion does not aim at presenting or discussing the whole legal and institutional framework on the disciplinary system of judges in Ukraine, since this has already been carried out in previous reports and studies. The present opinion will focus on the main problematic issues identified together with the HCJ members and other stakeholders of the judiciary. Nevertheless, even at the risk of repeating some of the conclusions expressed in prior documents and opinions, for the aim of improving the present legal framework, a remark on problematic rules will also be made, albeit not having been specifically pointed at by the Ukrainian authorities.

18. The assessment will be divided into two parts: the first one dealing with the rules on disciplinary offences and sanctions, and the second – on precise aspects of the disciplinary proceedings. At the end, a set of recommendations will be proposed.

3. Disciplinary offences

19. As was highlighted in previous opinions and reports, the regulation on the disciplinary offences in the LJ of Ukraine after the reforms carried out since 2017, is much more precise and detailed.

20. However, the description of the disciplinary infringements could be refined and the rules on imposing sanctions could be further spelt out so that the capacity of the HCJ could be improved and the system enhanced in line with Council of Europe standards. In general, the rules on disciplinary sanctions and offences include a gradation of the offences and the corresponding sanction to each type of offence. For example, the Turkish law on Judges and Prosecutors specifies gradations of offences (including for example suspension from work without excuse for various lengths of period) with matching gradations of sanction, ranging from a warning, through reprimand, various effects on promotion to transfer and finally dismissal.[9] Similarly, the law in Slovenia as will be seen below,[10] seeks to give effect to the general principle *nulla poena sine lege* by specifying categories of disciplinary offences.

21. It is, however, very noticeable in all such attempts that, ultimately, they all resort to general "catch-all" formulations which raise questions of judgment and degree. The CCJE does not itself consider that it is necessary (either by virtue of the principle *nulla poena sine lege* or on any other basis) or even possible to seek to specify in precise or detailed terms at a European level the nature of all misconducts that could lead to disciplinary proceedings and sanctions. The essence of disciplinary proceedings lies in preventing and sanctioning conducts that are fundamentally contrary to those that are to be expected from a professional in the position he/she is exercising.

22. As stated in the CCJE Opinion no. 3:

> *"64. At first sight, Principle VI.2 of Recommendation No. R (94) 12 might be thought to suggest that precise grounds for disciplinary proceedings should always "be defined" in advance "in precise terms by the law". The CCJE fully accepts that precise reasons must be given for any disciplinary action, as and when it is proposed to be or is brought. But, as it has said, it does not conceive it to be necessary or even possible at the European level to seek to define all such potential reasons in advance in other terms than the general formulations currently adopted in most European countries. In that respect therefore, the CCJE has concluded that the aim stated in paragraph 60 c) of its Opinion No. 1 (2001) cannot be pursued at a European level.*
>
> *65. Further definition by individual member States by law of the precise reasons for disciplinary action as recommended by Recommended No. R (94) 12 appears, however, to be desirable. At present, the grounds for disciplinary action are usually stated in terms of great generality."*

23. In that respect therefore, the CCJE concluded that the aim stated in paragraph 60 c) of its Opinion No. 1 (2001) cannot be pursued at a European level. However, the tendency is to provide more specification to ensure legal certainty, thus approximating the definitions of the disciplinary offences to the certainty required for criminal offences. While this is not required by the ECtHR, since disciplinary offences

[9] See CCJE (2002) Opinion N° 3, On the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality", para. 63.

[10] See under Annex 1.

and proceedings do not fall within the criminal limb of Article 6 ECHR, it is nevertheless considered as desirable for the safeguards of the judicial independence.

Assessment of Article 106 Ukrainian LJ – Disciplinary offences

24. The grounds for taking disciplinary action against judges in Ukraine are regulated under Article 106 LJ. This lengthy provision lists more than 20 disciplinary offences, both dealing with professional exercise and non-professional or out of court conducts. Many of the provisions are devoted to establishing liability related to the prevention of corruption and non-compliance with integrity checks, as for example not presenting information about the assets.

25. The description of certain disciplinary offences in the LJ can be deemed to be vague and too broad and there is no clear differentiation between ethics and disciplinary proceedings in the definition of some disciplinary offences. Certain amendments should be introduced in Article 106 LJ, where in some paragraphs the absence of a legal specification confers insecurity to the system and poses an undue threat for judges. In general, more clarity in the drafting of the offences is advised.

Article 106.1.1) LJ and 106.1.4) LJ

26. The infringements listed under this paragraph relate to the breach of procedural rules and principles. Article 106.1.1) LJ describes different conducts that are deemed unacceptable for the fairness of the proceedings. All the conducts under this paragraph entail disciplinary liability "regardless of whether they were committed intentionally or caused by negligence". This strict liability principle might be explained upon the reason that all the misconducts listed under this paragraph are clear breaches of the procedural rules and thus the professional duties of a judge. However, sanctioning upon a strict liability principle may be too harsh if applied to some of the grounds.

27. **Article 106.1.1 a) LJ: "unlawful denial of access to justice (including unlawful denial to review any statement of claim, statement of appeal, or a cassational appeal on the merits of the same) or any other substantial breach of procedural law in the course of administration of justice, which denied the exercise by the litigants of their procedural rights and compliance with their procedural obligations, or caused an infringement of rules regarding the court jurisdiction or composition"**

The infringement of procedural rules as envisaged under **Article 106.1.1) a) LJ**, generally leads to the nullity of the act or the proceedings. Imposing a disciplinary sanction when these rules are breached intentionally seems alright, since sometimes the application of the rules – e.g., on jurisdiction and competence– are not completely clear, as they depend on the facts of the case, and quite often those facts are not completely known or disclosed at the beginning. To sanction these types of procedural mistakes unintentionally would have been excessive, and thus it is positive that the law requires at least gross negligence on the side of the judge.

28. Another example: paragraph **1.1) f) of Article 106 LJ:** which provides for liability for **"violation of recusal/self-recusal rules with intent or negligence**. There might be situations where the judge really does not know that, for example, there is a connection to some of the parties which should lead to the abstention. Considering this as a disciplinary infringement, even if only sanctioned with a warning, would have negatively affected the reputation of a judge, who had acted in good will, and

unknowingly continued dealing with the case. Considering that even a warning might be kept in the personal file for six months and that a second minor infringement while the prior one is not cancelled turns out into a grave offence, it is positive that this conduct is only sanctioned if committed with intent or negligence.

29. In this regard it is also positive that the sentence "regardless of whether committed intentionally or due to gross negligence" has been removed from Article 106.1.4) LJ, and thus aligned this provision with the CoE standards.

30. It has to be reminded that the general standards state that "*The interpretation of the law, assessment of facts or weighting of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability except in cases of malice and gross negligence"* (para.66 Committee of Minister's Rec(2010)12). The term gross violation is not equal to violation due to gross negligence, and this paragraph seems to presume that any "gross violation" entails "gross negligence" which is not always the case.

31. In addition Article 106.2 of LJ determines that the reversal of a judicial decisions shall not entail disciplinary liability "except where any such overturned or amended decision was originally made due to an intentional violation of law or neglect of duty by the judge;" in line with the treatment of infringements by negligence set out under Articles 106.1.1) and 106.1.4) LJ.

32. Finally, **Article 106.1.1) b) LJ** defining the omission to motivate judicial decisions as a ground for disciplinary action, requires having been committed intentionally or as a result of gross negligence, which is to be welcomed, since the prior version of this provision defined the offence without such requirement.

Recommendation

It is recommended in application of Article 106.1.1) a), 106.1.1) f) and 106.1.4) LJ to take a view that mere negligence in taking some decisions, which allow for a margin of interpretation, should not lead to disciplinary liability.

Article 106.1.2) LJ

33. This provision establishes the offence for the unjustified delays or omissions by the judge to take action within the legal timeframe. Unjustified delays is one of the most frequent grounds that has triggered disciplinary proceedings in European countries. This paragraph should define that only when such delays are reiterated and really unjustified should lead to disciplinary liability.

34. Delays are frequent in courts, but those delays will lead to disciplinary liability of the judge only if certain circumstances are met. The delay has to be "unjustified". A delay caused by the excessive workload, or the lack of personnel shall not lead to disciplinary liability, even if it could trigger a claim against the State for malfunctioning of the justice system. However, even in courts that are overloaded, there may be an "unjustified" delay, for example, for not dealing promptly with urgent cases. Thus, the excessive workload will not render all delays as justified, and the judges have to be very attentive to deal swiftly with those cases which are especially urgent.

35. Other circumstances to be taken into account to find disciplinary liability for unjustified delays are: the general situation or the court, the length of the delays, the consequences (damages) caused by the delays, and if it is a single situation or an extended, reiterated one. The reiteration of the delays should be taken into account in grading the severity of the sanction. Finally, the subjective element is also of significance: the negligence or delay has to be the result of the willing or negligent attitude or behaviour of the judge, to comply with the principle of guilt.

36. As to the omission or neglect in exercising the judicial action, this has to be the manifest infringement of a judicial obligation, without justification. It implies an omission in acting.

37. Obviously in assessing the "justification" of the delays the whole context of the functioning of the administration of justice must be considered. Caseload adequate distribution, and human resources have to be in place in order to prevent systemic problems of delays, which would put additional pressure upon the judges. The calculation of the number of cases each judge should be handling/disposing/deciding has to be correctly done, in order to be able to evaluate when the delay is unjustified or not. Comparison analysis on the work done by each judge and the adequate software will allow to identify problematic courts, or undue delays. Otherwise, it is very complicated to determine when a delay is "unjustified".

Recommendation

In order to be able to assess the "unjustified" delays in exercising the judicial duties of a precise judge, set out under Article 106.1 2) LJ as a ground for disciplinary liability, consider establishing a clear workload distribution and a comparative analysis of the performance of judges – at least quantitative – only by comparison or providing for a clear disposal rate, the delays can be assessed as not justified.

Article 106.1.3) LJ and Article 106.1.12) LJ

38. This paragraph allows a disciplinary action to be taken upon a variety of inappropriate conducts which are: "the judge acts in ways that are considered inappropriate for a judge or disrupt the authority of justice, specifically, where related to morals, honesty, integrity, lifestyle that corresponds to the status of a judge, other rules of judicial ethics and behavioural standards that win public trust to courts, displaying disrespect to other courts, attorneys, experts, witnesses, or other litigants."

39. In analysing this provision, necessary reference needs to be made to the relationship between the ethical standards, usually set out in Codes of Ethics and the Disciplinary sanctioning system.

40. Generally, all member States have adopted respective codes of ethics. The codes seek to guide the performance of the jurisdiction and promote collective dialogue and personal reflection on the challenges faced by those who exercise it, in a complex and changing legal and social framework. They also seek to strengthen citizens' confidence in justice by making explicit the behavioural models according to which judges commit themselves to fulfil their functions." They describe the highest standards every judge should seek to comply with.

41. It is true that in some countries these two spheres are not adequately differentiated, which runs counter the certainty and security of the judicial independence which requires precision in the definition of the grounds for disciplinary liability. Although complete precision is almost impossible, leaving “open clauses” based on “moral standards” is seen as a high risk for the judicial independence.

42. It would be useless to have got rid of the general clause of “breach of judicial oath” as a ground for disciplinary action, and now introduce it again in a subtle way under this provision, since an “appropriate behaviour of a judge, related to morals”, leaves a comparable margin of interpretation, and thus risk for arbitrariness.

43. Impartiality and image of impartiality require certain conducts of judges, to be fulfilled also when they are not exercising their professional tasks. Because the image is so important to provide trust in the institution, judges have to accept certain limitations in their private life, which could affect such image of impartiality. But this does not mean that they are not granted their fundamental right to privacy as recognized in Article 8 ECHR.

44. Conducts that are completely unacceptable, even carried out in their private lives, could exceptionally lead to disciplinary sanctions, even if they are not criminally sanctioned. But following the Committee of Ministers’ Rec(2010) 12, paragraph 71: “Ethical principles should be laid down in codes of judicial ethics. In some states, such “codes” include the disciplinary regime for judges, but ethics standards should not be confounded with a disciplinary regime. Ethics standards aim at achieving, in an optimal manner, the best professional practices, while disciplinary regimes are essentially meant to sanction failures in the accomplishment of duties (paragraph 73 of the recommendation).”

45. This means that some ethical standards are also disciplinary offences (e.g., breach of the incompatibility rules), but this does not allow to elevate any “ethical or moral infringement” to a disciplinary offence. And this is precisely what 106.1.3) LJ does, in contradiction with the Council of Europe standards.

46. Taking into account the Ukrainian context and the broadly extended lack of integrity in vast fields of the judiciary, it is understandable that the law tries to provide for disciplining of judges who act against such morals and integrity principles. However, such an open definition of an offence is contrary to the Council of Europe standards, as set out in CCJE Opinion No. 3 which requires that offences and sanctions for disciplining judges should *be defined, as far as possible in specific terms.*

47. This is even more preoccupying taking into account that this offence is always to be considered as a serious offence, sanctioned with suspension or even dismissal, as the warning and reprimand are specifically excluded as possible sanction for misconducts under Article 106.1.1.3) LJ.

48. Under the term “morals” too broad powers would be open to the disciplinary bodies, increasing the risks for the judicial independence of the judges.

49. The same considerations apply to the wording under Article 106.1.12) LJ “the judge has demonstrated low integrity”. It is necessary to prevent corruption by keeping an eye on the standard of living of a judge and the mismatch with his/her actual income. However, such indications, might allow to carry out a closer supervision, or if evident they should be reported to the criminal investigative authorities, as a suspicion of a possible crime of corruption or, as provided in some legal systems, unjustified or unexplained wealth.

50. But “low integrity” is too broad a concept, which needs to be substantiated with precise facts. And if these facts point at corruption, criminal proceedings should be triggered, and the judges meanwhile suspended.

51. On the other hand, if there is a mismatch in the declaration of assets of a judge and his/her actual expenditures (or of the family), the disciplinary action can in any event be triggered under paragraphs 9, 10, 13 and 16 of Article 106.1 LJ.

Recommendation

Redraft Article 106.1.1.3) LJ to avoid resorting to general ethical standards as grounds for disciplinary sanctions and allow the ranking of the levels of sanctions when minor unethical conducts are committed. Otherwise, the proportionality principle would also be infringed.

Article 106.1.5) LJ

52. This provision seeks to ensure the duty of confidentiality of the judges preserving the secrecy of sensitive information known in the exercise of their professional functions. This approach is correct, but it has to be considered that even secret information might be disclosed in cases when this is necessary for the defence of the person obliged to keep the confidentiality of the information. Such exception needs to be contemplated, if the judge him/herself are accused of this breach, they are entitled to disclose the information, precisely to determine if it is “sensitive” or not, and thus if there is an obligation to confidentiality or not.

53. On the other side, if during a closed trial, out of the proceedings and evidence presented it is evident that other persons are involved in the crime or that there has been another crime committed, can this information not be disclosed to prosecute such crimes?

Recommendation

Include certain exceptions in Article 106.1 5) LJ to the duty of confidentiality as a ground for disciplinary offences and define better the scope of application.

Article 106.1.15 LJ

54. This paragraph defines as a ground for disciplinary action, the result of the criminal proceedings finding the judge guilty of committing a corruption offence or an offence related to corruption. The fact that there is a criminal conviction for corruption needs to lead to the dismissal of a judge from the judiciary, that is something out of question. Whether this needs to be done by way of a disciplinary procedure after the criminal conviction, or the criminal conviction should already include the disqualification to exercise the profession, is something to be discussed. For efficiency reasons, to open a subsequent disciplinary procedure to dismiss the judge does not seem the best way. However, this is left to the decision of each Council of Europe member State. It is however to be considered as a ground for dismissal and not only as a ground for taking action.

55. On the other side, it is not clear why Article 106 LJ mentions only criminal convictions related to corruption. Unless this is provided in another law, the LJ should already

provide that a consequence for a judge being convicted for a criminal offence should be the judge's dismissal. Obviously not every minor criminal misdemeanour should lead to the expulsion of the judge from the career, but conviction sentences of a certain gravity.

56. In this regard, the regulations in the member States differ. While in Italy Article 4 of the Legislative Decree (*Decreto Legislativo*) 2006/150 lists the type of criminal convictions that entail dismissal of the judge (see above), the Spanish law follows a different approach. The Spanish LJ provides for the dismissal, when a judge has been convicted for committing a crime intentionally which is punished with deprivation of liberty. Only in cases where the penalty is not higher than six months the HCJ can decide to change the dismissal for the suspension of the functions up to a maximum of three years (Article 379.1 d) Spanish LJ).

57. In any event, an issue that has to be dealt with is the interaction between disciplinary proceedings and criminal proceedings for the same facts run the risk of falling into *ne bis in idem.* At present, it is unclear whether both proceedings run in parallel and so there is no possibility of overstepping the statute of limitations of the disciplinary offence in case the criminal charges were finally not presented, or the criminal case was closed for any other reasons. But these parallel proceedings open the possibility of contradictory decisions about the facts and about the liability. This is why it should be considered whether priority should be given to the investigation of a possible criminal offence and to the criminal prosecution and, as a consequence, in order to avoid the time limit, the disciplinary proceedings must stay while the criminal proceedings are running without counting this time for the statute of limitations. Furthermore, the facts eventually declared proven by the relevant criminal body must be taken into account in the disciplinary proceedings, so avoiding the said risk of contradictory decisions.

58. It should be further discussed with the members of the HCJ and other Ukrainian stakeholders whether the parallel conduct of these proceedings poses problems in practice, that is, that the disciplinary sanction and conduct of disciplinary proceedings do not pose a threat to the conduct of criminal proceedings or vice-versa. Introducing the possibility to suspend the disciplinary proceedings while the criminal proceedings are taking place, would mean that the outcome of the criminal proceedings about the facts must be necessarily considered in the disciplinary proceeding, if it does not already exclude it.

Recommendation

Article 106.1.15 LJ should be amended to include as a ground for dismissal not only criminal convictions related to offences of corruption, but also other serious intentional criminal offences.
Consider also whether the criminal conviction should already as a penalty include the dismissal of a judge, and therefore avoid duplicating proceedings to dismiss a judge once the criminal conviction has become final.

Article 106.1.paras. 9,10, 13, 16,17,18,19 LJ

59. All these paragraphs deal with the obligation to declare assets, the non-fulfilment of this obligation, or for presenting an incomplete or delayed declaration, as well as for not declaring family issues in this regard or that might affect to conflict of interests.

60. These provisions are reasonable in the Ukrainian context and its past experience of corruption within the judiciary. However, formally it is reiterative and extremely cumbersome. Thus, from a purely linguistic perspective, it should be considered to merge several of these paragraphs and provide for a lighter wording/drafting.

Recommendation

Revise the wording of the above-mentioned paragraphs and consider merging some of them for a better understanding and oversight. This might also aid in the future statistical classification of the disciplinary offences, if the failures to comply with declarations are contemplated jointly under the same heading.

Assessment of Article 109 Ukrainian LJ - Disciplinary sanctions

61. Disciplinary sanctions are mainly included under the lengthy Article 109 LJ. As to the types of sanctions, **Article 109.1** lists the diverse sanctions for disciplinary offences. These types of sanctions are adequate, and apt to be adjusted to the gravity of the infringement. They are similar as those found in the laws of other countries. Other countries include in addition the possibility to disqualify the judge for managerial positions as a type of sanction. In the LJ in Ukraine, it is provided that the judge with an unexpunged disciplinary sanction shall not be eligible for selection for a position in another court. It should be considered if the sanction should also impede the appointment to a managerial position of the judge. In general, the types of sanctions are adequate.

62. As to the criteria for ensuring proportionality, **paragraph 2 of Article 109** includes adequate criteria, which shall be assessed on a case-by-case basis and also interpreted to meet the adequate balance.

63. The rules for ranking the sanctions depending on the gravity of the infringement, as set out in Article 109.2 LJ, are good as general guidelines to ensure the proportionality principle in the sanctioning system and is in line with the practice of other jurisdictions, where disciplinary bodies take the following circumstances into account when assessing the severity of the guilt and "other relevant circumstances". For example, as mitigating circumstances in other legal systems the following are also defined: that the judge has not previously been found responsible in disciplinary proceedings; his/her conduct during the disciplinary proceeding, including (partially or completely) admission of the offence; the results achieved during the performance thereof; the years of service; the caseload; other personal circumstances, including health and family issues (Serbia).[11]

64. However, a classification of the disciplinary infringements into different categories of seriousness and regulating the sanctions for them, accordingly, would be advisable, as this would reduce the discretionary powers of the disciplinary sanctioning bodies and provide for more legal certainty. The law only provides which conducts are considered as very grave and thus lead to dismissal of the judge (Article 109.8 and 9 LJ). However, as will be explained below (and has been stated above), the

[11] Chapter 7 **"Disciplinary Accountability of Judges"** (Articles 89-98) of the *Law on Judges of Serbia* regulates the disciplinary offences (Article 90) and the general principles on sanctions (Article 91 and 92) and the disciplinary proceedings (Articles 93 ff.). A more detailed regulation, precisely on the mitigating circumstances is provided in the *Rulebook on Disciplinary Proceedings and Disciplinary Responsibility of Judges*, passed at the session of the High Judicial Council held on 24 September 2010.

misconducts that **shall** lead to dismissal are too vaguely defined, and they are not even apparently entailing gravity.

65. The modalities and extent of the execution of the sanctions must also be clarified. The fact that two minor infringements regardless of their nature may end up in a serious infringement with possible dismissal (see paragraph 8.2) of Article 109 LJ). As is now provided in the law, it does not comply with the principle of proportionality and increases the risk of being used as a way to put undue pressure upon individual judges. Amendment of Art. 109. LJ is needed in order to define more precisely what kinds of repeated infringements may be considered as a serious infringement with possible consequence of dismissal.

66. The recidivism is to be taken into account in selecting the sanction, although this is somewhat reiterative with the provision included under Article 109.6 LJ, which already contemplates this as an aggravating circumstance.

67. **Paragraphs 3 and 4** establish mandatory minimum penalties for certain offences, excluding the possibility of leniency of minor sanctions for certain misconducts. Warning and reprimand shall be specifically excluded for the offences listed under those paragraphs, which means that the law considers those offences as serious or very serious.

68. However, while the law seeks to ensure that a major sanction is imposed in cases of serious breaches, it does not prevent that minor misconducts can lead to severe sanctions. This is only foreseen in general or abstract terms, when listing the general criteria to select the sanction under Article 109.2 LJ.

69. While this is not to be seen as incorrect per se, it leaves a very wide margin of appreciation to the disciplinary body to select the sanction, and even in case of minor infringements, attending for example to the "personality" of the judge or "any other relevant circumstance" impose a severe sanction, and thus, infringing the proportionality principle.

70. Regarding **Article 109.4 LJ**, it is unclear why the removal from office (clause 6, para.1) "may not be imposed upon a judge of a high specialised court". Clarification as to the reason for this provision, is needed.

71. As to the suspension from service, **paragraph 5** provides for this possibility only "from the date of approval of the decision to impose the disciplinary sanction upon the judge". It might be considered whether under certain circumstances a temporary suspension might be also decided as a precautionary measure, even before the decision imposing a sanction has been adopted.

72. **Paragraph 8** reads: "8. A disciplinary sanction in the form of initiation of the judge's removal from office shall be imposed in the following cases: 1) a significant disciplinary misdemeanour or gross or systematic neglect of the duty that is incompatible with the status of a judge or has shown that the judge is not qualified for their current position; 2) the judge has failed to prove the legitimate origin of their income."

73. This provision does not leave any margin to the disciplinary body, since it states that the removal **shall** be imposed in the cases described in its two subparagraphs. This might result also in a disproportionate sanction, due to the broad description of the offence ("significant disciplinary misdemeanour").

74. The unjustified origin of wealth or assets as a ground for dismissal, which entails a burden to proof the origins of such properties upon the judge, should lead to the dismissal, only if enough indications of corruption are established. Interpreted in a strict sense, it might lead to dismiss every judge who has not a bill for some object or property. And none of us keeps bills of everything we possess. A better drafted provision should prevent arbitrary use of this ground for dismissal, in cases where the misdemeanour is not serious, or the unexplained origin of a property is of a minor importance. However, the wording of the provision in imperative terms, seems not the allow for any margin of interpretation.

75. To clarify this, the next paragraph 9 tries to define what is to be considered a "significant misdemeanour" or "gross systematic neglect". However, the definition of these terms cannot be considered as acceptable, as they include even more diffuse concepts as "inappropriate acts especially related to morals…". We refer to the critics expressed to such definition of a misconduct done above, when commenting Article 106.1.3) and 12) LJ.

76. Finally, the disciplinary system does not establish whether the same behaviour can be subject to more than one type of sanction and vice versa, whether several infringements should be assessed together for the purpose of sanctioning. This is why it should be considered the possibility to add to the rules on sanctioning the principles applicable to joint sanctions and/or infringements, in order to increase legal certainty. Clearer rules on accumulation of offences/sanctions should be introduced.

77. It can be stated that some prior recommendations already provided to the Ukrainian authorities have not been taken on board or are still to be checked. For example, as expressed before in the Assessment of the 2014-2018 Judicial Reform in Ukraine, following recommendation was already included:[12]

> *"To eliminate the disciplinary offence for rendering a judgment which is later found to be the basis of a finding of a violation of the European Convention on Human Rights by the ECtHR."*

78. This provision is however still found under Article 106.1.4) LJ. It was also recommended to "ensure a restrictive interpretation of this very broadly drafted disciplinary offence concerning the breach by a judge of ethical norms and morals (Article 109.9.1 LJ) and the disciplinary offence resulting from an ECtHR judgment (Article 109.12 LJ). It has to be again insisted on these aspects related to the legal framework, as well as to its implementation.

Recommendation

The sanctioning system leaves a too broad leeway to the disciplinary body to select the sanction, which increases the risk of arbitrariness as well as the imposing of disproportionate sanctions. The lack of certainty and foreseeability of the type of sanction that might be imposed for each of the administrative offences is not advisable and should be corrected. It is recommended to amend Article 109 LJ following the arguments detailed above.

[12] Assessment of the 2014-2018 Judicial Reform in Ukraine and its compliance with the standards and recommendations of the Council of Europe. Consolidated summary, April 2019, prepared within the CoE project "Support to the implementation of the judicial reform in Ukraine".

Assessment of Article 110 Ukrainian LJ – Expungement Disciplinary sanctions

79. Regarding the personal record of the relevant judge, the provisions envisaged under Article 110 LJ as to the time limits for cancelling the sanctions seem to be adequate. However, it is not completely clear what is the reason not to cancel (expunge) the sanction when another infringement has been committed within the period while the previous sanction has not been expunged, unless this is kept only until the second disciplinary proceedings are decided. It is understood that, since a prior sanction which is not cancelled shall result in a more serious disciplinary offence (Article 109.6 LJ provides for this aggravating circumstance), the record is kept while the second procedure decides on the second disciplinary offence.

80. However, once this is decided, there is no reason for avoiding the cancellation of the prior sanction from the record. It is assumed that when a subsequent sanction is imposed, the new sanction will be registered in the record, with the legal consequences this has (no promotion, no selection for a position in another court – Article 109.7 LJ–, etc.).

81. This may result in very adverse consequences, as accumulated minor sanctions can become a serious disciplinary offence, which could lead to a dismissal (Article 109.9 2) LJ). Again, this may cause an undue pressure upon the judges who have been previously sanctioned for minor infringements. It should be reconsidered amending the LJ to correct this disproportionate effect.

82. Since the qualification assessment regulated under Article 84 LJ provides that one of the elements to consider is the personal file of the judge (Article 85.4 1) LJ), and in this file the information on disciplinary sanctions is to be included (Article 85.4.10 LJ), it is clear that the non-cancelling of the sanctions for committing another one will have a negative impact upon the promotion of the judge. It might be considered enough to see that the last sanction is not expunged to decide on the promotion and the assessment, not being necessary to extend the expungements of other prior sanctions.

Recommendation

Revise the wording of Article 110 LJ so that each of the sanctions is expunged within the legally provided time limit, and this time limit is not extended because other offences were committed during the time the prior sanction is not expunged.

4. Disciplinary proceedings

83. As to the requirements of the disciplinary proceedings against judges before the disciplinary body, they have to fulfil the fair trial safeguards as recognised under Article 6.1 ECHR. The ECtHR in a well-established case-law has set out that the disciplinary proceedings, in which the right to continue to exercise a profession is at stake, gives rise to "disputes" over civil rights within the meaning of Article 6.1 ECHR.[13] This principle has been applied with regard to proceedings conducted before various professional disciplinary bodies and in particular as regards judges in *Baka v. Hungary.*[14] In *Olujić v. Croatia*[15] the ECtHR appreciated the violation of fair trial standards in the light of four criteria: the lack of impartiality of the tribunal, the violation of the principle of equality of arms, secrecy and excessive length of proceedings. In addition, the Court found that when the same disciplinary body brought charges, conducted proceedings and ultimately imposed disciplinary sanctions because the impartiality was not safeguarded. In other judgments the ECtHR put emphasis on the fact that the judicial councils were not independent and impartial due to their composition and/or way its members were appointed.[16]

84. The relevant criteria for satisfying the requirements of Article 6(1) ECHR concern both the disciplinary proceedings at first instance and the judicial proceedings on appeal. As stated in *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], 2018,[17] this implies that the proceedings before the disciplinary body should not only entail procedural safeguards (para. 197) but also, when the applicant was liable to incur very severe penalties, measures to establish the facts adequately (paras. 198 ff.). In this case, the Court paid particular attention to the fact that the sanctioned judge had not had the chance to be heard before neither before the disciplinary body of the judicial council of Portugal which took the decision to impose a sanction upon her, nor before the Judicial Division of the Supreme Court, competent for the review of the decision of the judicial council. In that case, not only taking into account the gravity of the sanction, but also the crucial factual element that led to the disciplinary sanction, together with the limited scope of the appeal, the Court found violation of Article 6 of the Convention.

85. From the procedural point of view the present disciplinary system seems to have improved considerably due to the amendments introduced in the last years. Nevertheless, some comments and recommendations will be set out here, with the aim of seeking to improve some of the provisions on disciplinary proceedings. This opinion has considered the concerns expressed by the main stakeholders during the online meetings held with them, but also the experience of some other European countries, but with a view to the specific context of the Ukrainian judiciary and present reality.

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[13] *Philis v. Greece (no. 2)*, 27 June 1997, § 45, *Reports of Judgments and Decisions* 1997-IV, and *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 62, ECHR 2007-II).

[14] *Baka v. Hungary* [GC], Appl. no. 20261/12, 23 June 2016, paras. 104-105; and for prosecutors in *Polyakh and Others v. Ukraine*, Appl. nos. 58812/15 et al., 17 October 2019, para. 160; and for practising lawyers in *Malek v. Austria*, Appl. no. 60553/00, 12 June 2003, para. 39; and *Helmut Blum v. Austria*, Appl.no. 33060/10, 5 April 2016, para. 60.

[15] *Olujić v. Croatia*, Appl. no. 22330/05, 5 February 2009.

[16] *Oleksandr Volkov v. Ukraine*, Appl. no. 21722/11, 9 January 2013; ECtHR, *Kulykov and others v. Ukraine*, Appl. no. 5114/09, 19 January 2017. See also, *Broda and Bojara v. Poland*, Appl. nos. 26691/18 and 27367/18, 29 June 2021; and *Żurek v. Poland,* Appl. no. 39650/18, 16 June 2022.

[17] *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], 6 November 2018.

86. Since all the standards and institutional settings regarding the disciplinary proceedings have been a subject of a prior comparative study, we will not further elaborate on the general requirements on the disciplinary proceedings to comply with the CoE standards.[18] Here, the assessment will focus on precise issues raised by the Ukrainian authorities, taking into account the prior findings and comparative studies. The questions to be addressed will be the following:

1) The possibility of ex-officio investigations on disciplinary misconducts by the HCJ. Possibility of a proactive conduct of the HCJ or need to wait until there is a formal complaint raised by a complainant?[19]
2) Rights of complainants, participation, right to appeal, right to know the reasons for rejecting their complaint?
3) Disciplinary proceedings: standards of proof; how to proof *mens rea*, malicious conduct, intent; sources of evidence.

Other relevant issues

4) Criteria for selection of the members of the inspection service and responsible for the disciplinary inquiry. The issue of the salary.
5) Scope of judicial remedy.

The possibility of ex-officio investigations on disciplinary misconducts by the HCJ. Possibility of a proactive conduct of the HCJ or need to wait until there is a formal complaint raised by a complainant?

87. The Ukrainian LJ provides for the filing of complaints against judges for triggering the disciplinary action under Article 107 LJ. Anyone can file a complaint. The formal requirements for such a complaint are set out under paragraph 2 of Article 107 LJ, and it should follow a template approved by the HCJ (Article 107.3 LJ). In addition, Article 42.1 LHCJ provided for the possibility to commence a disciplinary proceeding

> *"upon receiving a report on the commission of a disciplinary offence by a judge or after the members of the High Council of Justice independently identify from any source circumstances that may indicate the commission of a disciplinary offence by a judge, or on the initiative of the Disciplinary Chamber, the Commission on Integrity and Ethics or the High Qualification Commission of Judges of Ukraine in the cases specified law (disciplinary complaint)."*

88. However this paragraph one of Article 42 LHCJ was recognised as inconsistent with the Constitution of Ukraine (unconstitutional), according to the decision of the Constitutional Court No. 4-p/2020 of 03.11.2020. Thus, the two ways that existed to trigger a disciplinary procedure against a judge –which were upon the initiative of a claimant or ex officio by the HCJ without a prior formal complaint–, after this Constitutional Court judgment, remains as only one. Since this expert has not have access to the complete text of such judgment, I will refrain from making any comment on the motivation or grounds upon which the Ukrainian Constitutional Court took such decision. If the finding of Article 42.1 LHCJ unconstitutional, was on the basis that according to the accusatorial principle applicable in criminal proceedings and to a

[18] See among others the Report "On Certain Aspects on the Role of The Councils of The Judiciary in Disciplinary Proceedings Against Judges and Compliance With Fair Trial Rights", prepared by Lorena Bachmaier within the Project "Ensuring the effective implementation of the right to a fair trial (Article 6 of the ECHR) in Ukraine", October 2022.

[19] By "ex officio" investigations it is meant here those started by the HCJ, without a prior complaint from an external person or organization, thus on its own initiative.

certain extent also to administrative sanctioning proceedings and disciplinary proceedings (although the ECtHR has stated that disciplinary proceedings fall within the civil limb of Article 6 ECHR and thus the criminal law principles do not apply equally to them), the same body that is competent to decide on the merits should not act as "accusing party". In this regard, and without aiming to address the content of the Ukrainian Constitutional Court –since I have not read the judgment–, it should be stated that the fact that the HCJ triggers the initiation of the proceedings, by giving notice to the relevant body of the disciplinary commission to confirm the possible commitment of a disciplinary infringement, is not against the accusatorial principles and would not affect the impartiality of the HCJ in deciding later on the case. As long as its function is merely to receive notice of a possible breach and pass it over to the investigating body for checking if there has been in fact a violation of the professional duties of a judge, this would not be against Article 6 ECHR. In fact, other legal systems, as for example, the Spanish Law on the General Council of the Judiciary, foresees such possibility. In the Spanish system, the HCJ can receive the reports of the inspection service and upon them, it will transfer the case to the promoter of the disciplinary action to check whether there is a possible disciplinary liability.

89. As to the private formal complaint, differently to other legal systems, the complainant must substantiate the grounds and provide not only factual data but also evidence. In addition, the complainant shall be identified and shall signed the complaint. Filing "knowingly unfounded disciplinary complaints" against judges by attorneys may result in disciplinary action taken against them (Article 107.5 LJ). Thus, as the law stands now, anonymous information or reports, will not be accepted, and will not trigger a preliminary disciplinary inquiry (Article 107.6 LJ).

90. The requirements for the complainant are therefore similar as to a private prosecutor (victim filing a criminal charge), or a civil suit.

91. In Italy, all complaints about possible disciplinary offences that reach the Public Prosecution at the Cassation Court, are entered in the register of the pre-disciplinary division of the Public Prosecution at the Cassation Court and will lead to a preliminary inquiry, regardless of the identification or the evidence presented with the complaint.Hoever, it has to be noted that in the Italian system, the owner of the disciplinary action is the Ministry of Justice.[20]

92. This is not the model followed by all countries, which also provide for the possibility to file anonymous reports and also to trigger ex officio preliminary inquiries if there is a prior indication of a possible infringement committed by a judge.

[20] Legislative decree 23 February 2006 n. 109 of the disciplinary procedure:
Art. 14. Ownership of the disciplinary action
"1. Disciplinary action is brought by the Minister of Justice and the Attorney General at the Court of Cassation.
2. Within one year of news of the fact, the Minister of Justice has the right to initiate disciplinary action by requesting investigations from the Attorney General at the Court of Cassation. The Minister notifies the Superior Council of the Judiciary of the initiative, with a summary indication of the facts for which the proceeding is taking place (1) .
3. The Attorney General at the Court of Cassation has the obligation to exercise disciplinary action, notifying the Minister of Justice and the Superior Council of the Judiciary, with a summary indication of the facts for which the proceeding is taking place. If the Minister of Justice believes that the disciplinary action should be extended to other facts, he requests it, during the investigation, to the Attorney General."

93. A very broad access for complaints is also foreseen in Spain, a system that has opted to create a general office for open complaints that seek to improve the service of the Administration of Justice, as well as to ensure compliance by the judges of their tasks.[21]This body is called the *Unit for citizen's assistance* (*Unidad de atención ciudadana*) and receives all the complaints and reports regarding the functioning of the courts (not only the judges). Special attention has been given to make it very accessible to every citizen. Citizens can file complaints on-line, by registering a complaint at the HCJ or by introducing the complaint into a specific box that is provided in every court. There is a specific form, accessible on-line, but the use of such forms is not mandatory. In practice the most frequently used way is the on-line complaint. Upon receipt of a complaint or a report, which does nto need to fulfill any formalities, the unit shall acknowledge receipt within 48 hours (if the complainant is identified). Time to respond to the complaint is a maximum of two months. The main goal is to address problems detected by citizens and to work in creating trust in the judiciary. Complaints related to the content of the judicial decisions are rejected. Those that refer to the conduct of a judge, are re-sent to the Disciplinary Commission.

94. This body acts as the first entry for the complaints, and does the essential classification of the complaints, sending those that relate to judges to the disciplinary commission of the HCJ, and the rest to the relevant inspection or other civil servants' disciplinary bodies. The Unit for citizen's assistance is directed by a judge, who is appointed by the Plenary of the HCJ after open competition among judges and is assisted by 3 other judges and around 10 administrative staff. This unit receives annually around 11.000 complaints (all of them enter the electronic data base). Anonymous complaints if not manifestly ill-founded are also sent to the relevant body, to decide if further preliminary investigation should be carried out or not.

95. The two most frequent grounds expressed in the complaints/reports are: excessive length of judicial proceedings (43%); and disrespectful treatment (around 13%). Regarding the excessive length of proceedings, almost none of the delays are attributable to the judge himself/herself, and thus usually they do not trigger a disciplinary procedure against a judge. Regarding the complaint of disrespectful behaviour, most of the complaints were directed against the court staff (54%) and only few cases against the judges (7,83 %).[22] Many of the complaints are filed by the lawyers acting in court, not satisfied with the way the judge was directing the hearing.

96. Around 1000 of the received complaints were sent for preliminary inquiries to the disciplinary inquirer (also called Promoter), because they relate to judges and might entail a possible disciplinary liability. The decisions rejecting the complaints are notified to the claimants who can appeal the non-admission to the disciplinary commission. Annually around 200 citizens appeal the decision on rejecting the complaint against a judge, and according to the information gathered by the commission only two of those appeals were accepted.

97. Thus, the information that reaches the Promoter of the Disciplinary Action regarding possible disciplinary offences of judges comes mainly though the complaints directly presented by the citizens (around 60 to 80%), by using the "post-box", the on-line access or sending it directly to the GCJ to the Unit for citizen's assistance. The rest

[21] The rules of the Law of the General Council of the Judiciary on the functioning of the Disciplinary proceedings by the Disciplinary Commission (Articles 605 and ff.), are to be complemented by the Regulation 1/1998, of December 2, for the processing of complaints and claims relating to the functioning of the Courts and Tribunals, and in Instruction 1/1999, which contains the Forms for processing complaints and claims and prior information to the citizen.

[22] Data of 2020.

of the disciplinary complaints comes either from the presidents of the courts, the chambers of management, and through the service of inspection of courts of the HCJ.

98. In practice if the Inspection Service, during their inspection activities of the courts detect behaviours that could entail disciplinary liability of a judge, they should report to the Promoter of the Disciplinary Action. And the other way round: when a report regarding to undue delays reaches the Disciplinary commission, they will request data on the functioning of the relevant court and statistics regarding the number of cases, pending cases and average duration of the proceedings. The data collected by the Inspection Service will allow also the Disciplinary Commission to identify a possible misconduct of the relevant judge.

99. Such a system allows both an open channel for the citizens to report on possible misconducts of judges, and on the other side, to react and correct possible disfunctions detected ex officio.

100. This model presents advantages as well as disadvantages. On one side, the unit for the assistance of the citizens receive thousands of ungrounded claims and employ time and resources just to discard them. But on the other side, they get access to information from the citizens, many of which would not file a complaint if they were required to identify themselves, because of fear for retaliation. Such a broad access to report – again, many of them completely unfounded – allows also getting a picture on cases of malfunction, for example, when there are numerous complaints against the behaviour in a court, the promoter or the inspection might trigger an ex officio inquiry to confirm whether there is a problem or not.

101. The main disadvantage is the costs in terms of time and human resources to sift all the unfounded complaints. Nevertheless, Spain opted for such a model, being aware that many misconducts will not be reported because of fear of retaliation. Especially if the private party is a lawyer, they will not want to have the judge as an enemy in their practice.

102. Within the Ukrainian context, it should be considered whether the disciplinary oversight is too much limited by requesting from the complainant to identify themselves and to present evidence. Of course, opening the possibility for everyone to complain, even anonymously might result in a harassment upon judges. Thus, the Spanish model offers an adequate balance, allowing all the complaints to flow into the system and then filter out those which are substantiated.

103. By judgment of the Constitutional Court of Ukraine of 03.11.2020 declaring the unconstitutionality of Article 42.1 LHCJ –which provided for the possibility of ex-officio disciplinary proceedings by the HCJ–, it needs to be seen whether the action of the disciplinary commission triggered only by identified private claimants responds to the needs of ensuring the compliance with the professional duties of the judges. It shall be seen in the next future whether this is enough to provide adequate oversight and adherence to the principles of legality and independence of the judges in performing their work.

104. On the side of the implementation, the selection of cases that the Disciplinary Chamber is sending back to the Disciplinary Inspector for further preparation, it would be advisable to include in the law a specific provision highlighting that the decision of the Disciplinary Chamber must be guided by the principle of legality and not of opportunity. Clear criteria and greater transparency would be needed, precisely as to the ground for refusal set out under Article 44.1 3) LHCJ: “the disciplinary complaint

shall not contain references to factual data (testimony, evidence) on the disciplinary offence of the judge".

105. Refusing to proceed with a *prima facie* reasoned complaint against a judge on the reasons that the complainant has not provided the evidence (Article 107.6 LJ) does not seem to be a proper approach in ensuring the clean functioning of the justice system. In many cases, such information will not be directly available to the claimant, who has no power to summon witnesses. This ground for refusal to open a preliminary investigation upon the alleged misconduct of a judge, does not seem to allow the court users as well as other citizens to play an active role in controlling the public service that the judges are called to comply with.

106. On the other side, limiting the possibility of the claimant to challenge the decision taken by the Disciplinary Chamber, in the hands of such body,[23] does not seem coherent with the requirements provided to file a claim: full identification, full factual and legal grounds, etc.

Recommendation

Consider introducing the possibility of accepting disciplinary complaints when they appear to be grounded, even if the complainant does not include the relevant evidence with it.
Consider revising the possibility of the HCJ to trigger the initiation of a disciplinary preliminary inquiry upon the information received by the inspection service or obtained in the performance of its own functions, as long as this does not contradict the findings in the Constitutional Court decision of 3.11.2020.

Rights of complainants, participation, right to appeal, right to know the reasons for rejecting their complaint?

107. It was discussed with the Ukrainian authorities to what extent the person presenting a complaint for disciplinary liability against a judge should also have a standing to intervene as "active party or accuser" in the subsequent disciplinary proceedings. This is not the rule in general since the complainant does not have a subjective right in these proceedings – neither to have the judged sanctioned nor to have the proceedings carried out to an end. Differently from a victim who in certain criminal proceedings might be accorded a standing to act as private accuser, this is not the case in the administrative proceedings, including disciplinary proceedings. The complainant, as a rule, has only the right to present the claim and, if enough reasons exist, that the preliminary inquiry is carried out. Further, the decision of the disciplinary body not to indict a judge in disciplinary proceedings, can be eventually challenged by the claimant. To that end, the claimant should be informed. However, there is ususally no right to further participate in the disciplinary proceedings. Nevertheless, it shall be further analysed which would be the most appropriate solution for the Ukrainian disciplinary body, considering the context in which it operates, and also the long history of judicial lack of independence and corruption.

[23] Article 51.1.II LHCJ: "The complainant shall have the right to appeal the decision of the Disciplinary Chamber on the disciplinary case to the High Council of Justice if the Disciplinary Chamber gives permission for such an appeal."

108. Article 52.2 LHCJ provides standing for the claimant to appeal the decision of the HCJ before a judicial court, under certain circumstances: “The right to appeal to a court the decision of the High Council of Justice adopted following consideration of the complaint to the decision of the Disciplinary Chamber, has the judge against whom the corresponding decision was adopted, and the complainant, if the decision of the High Council of Justice is adopted on the grounds of his/her complaint.”

109. While this is not required by Council of Europe standards, and it is not a usual practice in other European countries, it does not violate any principles. It is up for the Ukrainian authorities to assess whether in the Ukrainian context such an appeal might be convenient, due to the need to restore trust in the judiciary and past political interferences in the composition of the HCJ. Or rather, to consider that such appeal by the private claimant shall be derogated, because it can harm the reputation of the judge or even exercise undue pressure upon the judicial independence. Further discussions on this topic with the Ukrainian stakeholders are advisable.

110. In sum, the general conclusion is that there is no subjective right of the complainant to have a judge disciplined or sanctioned. Oversight on the reasons for rejecting the complaint or the right to be informed on the reasons for disciplining or not disciplining is adequate but providing a general right to appeal the decisions of the disciplinary body is not a requirement envisaged in other countries, nor is it contemplated in the Council of Europe standards.

111. This is precisely defined under para. 67. of the CCJE Opinion “On the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality”, of 19 November 2002:

> *“67. An important question is what if any steps can be taken by persons alleging that they have suffered by reason of a judge's professional error. Such persons must have the right to bring any complaint they have to the person or body responsible for initiating disciplinary action. But they cannot have a right themselves to initiate or insist upon disciplinary action. There must be a filter, or judges could often find themselves facing disciplinary proceedings, brought at the instance of disappointed litigants.”*

Recommendation

There is the possibility to limit the standing of the complainant to challenge the decision of the HCJ before a court. While this is possible under the Council of Europe standards, since the complainant does not have a subjective right to get a judge sanctioned, it is for the national authorities to consider if according to the Ukrainian context, this is advisable. Elements to be taken into account to decide on this shall be, the need to provide trust in the judiciary, the workload of the HCJ and the courts, and the adequate functioning of the disciplinary proceedings.

Disciplinary proceedings: standards of proof; how to proof mens rea, malicious conduct, intent; sources of evidence

112. This question is already addressed in the Report on the “Disciplinary liability of prosecutors in Ukraine”, prepared by the Centre of Policy and Legal Reform, Kyiv, 2019, and which is applicable *mutatis mutandis* to the disciplinary proceedings against judges and further discussed in the Expert Analysis of the Disciplinary

Practice of the Designated Authority in Charge of Disciplinary Proceedings, for Nine Months of Operations (2021-2022), prepared with the support of Council of Europe Project "Human Rights Compliant Criminal Justice System in Ukraine" by Mr Volodymyr Petrakovskyi, of October 2022, and in the study "Disciplinary Liability of Public Prosecutors in Ukraine (by O. Banchuk, M. Kameniev, Ye. Krapyvin, B. Malyshev, V. Petrakovskyi, M. Tsapok. – K.: O. M. Moskalenko), of 2019.

113. As stated by Petrakovskyi in the report prepared in 2019, it was found out that in addressing disciplinary liability against judges the disciplinary body favoured the standard of proof "beyond a reasonable doubt". The Designated Authority has also chosen this standard for itself.[24] It should be noted that the member of the Designated Authority was guided by this standard when it decided whether to initiate/refuse to initiate proceedings. This author concludes that this approach does not stand up to criticism, because there is no legislative rule that imposes such standard, but rather the Constitution (Article 62) and the Criminal Procedure Code (Article 17) link the standard of proof "beyond a reasonable doubt" with criminal proceedings only. In addition, the case law of the ECtHR by classifying the disciplinary proceedings under the civil limb, makes clear that the standard of evidence "beyond reasonable doubt" which is applicable to criminal proceedings, does not need to be applied in disciplinary proceedings.

114. In this context, the ECtHR case of *Grinenko v. Ukraine*[25] was invoked to justify the application of the highest standard of evidence, although such judgment was dealing with a criminal case, and thus its findings cannot be transferred to the disciplinary proceedings.

115. Introducing such high standard of evidence might prevent an efficient application of the disciplinary liability system and leave many infringements without sanction. Such an approach might not be seen as the applicable standard in every case decided by the disciplinary commission. The criminal law domain requires higher guarantees and, accordingly, a higher standard of proof in comparison with the disciplinary proceedings. Standard of proof "beyond a reasonable doubt", which is the highest among all known standards is indeed the standard applied in criminal law. It is true that control has to be exercised so that the classification of disciplinary sanctions at the national level is not used to circumvent the safeguards of the criminal procedure, as stated in the famous *Engel criteria* doctrine.[26] But if such classification is not

[24] Decision of the Designated Authority No. 7дп-21 dated 25.11.2021, 13дп-21 dated 09.12.2021, 24дп-21 dated 16.12.2021 and 73дп-22 dated 08.06.2022. It should be noted that the member of the Designated Authority was guided by this standard when it decided whether to initiate/refuse to initiate proceedings. Decision of the member of the Designated Authority furnished without number, dated 03.02.2022 (O. I. Stukonoh).

[25] *Grinenko v. Ukraine,* Appl. 33627/06, of 15 November 2012.

[26] Art. 6 ECHR sets out specific procedural safeguards for a "criminal charge." These are commonly referred to as the three *Engel* criteria, for they were first identified in the ECtHR's benchmark case *Engel and others v. The Netherlands*, Appl. nos. 5100/71 et al, of 8 June 1976. *Engel and Others v. The Netherlands and* serve as the yardstick for establishing the applicability of these criminal procedural safeguards under Art. 6 ECHR: These criteria are: 1) The legal classification of the offence under national law; 2) The very nature of the offence; and 3) The degree of severity of the penalty that the person concerned risks incurring. In applying the criterion of the "criminal nature," both the Strasbourg Court and the Luxembourg Court have previously focused on the aims of a sanction, i.e., whether it has a punitive or a deterrent effect. See further, L. Bachmaier Winter "Disciplinary Sanctions against Judges: Punitive but not Criminal for the Strasbourg Court. Pragmatism or another Twist towards more Confusion in applying the Engel Criteria?", *eucrim* 1/2023, pp. 8, at:

arbitrary and the disciplinary does not encroach the criminal nature, the higher standards of proof are only required in the criminal procedure. In the case *Ezeh and Connors v. the United Kingdom*, [27] the ECtHR noted that "in explaining the autonomous nature of the concept of 'criminal' in Article 6 of the ECHR, the Court emphasized that the Contracting States cannot at their discretion classify an offense as disciplinary instead of criminal, or prosecute the author of a 'mixed' offense on the disciplinary rather than on the criminal plane as this would subordinate the operation of the fundamental clauses of Article 6 to their sovereign will. The Court's role under that Article is therefore to satisfy itself that the disciplinary does not improperly encroach upon the criminal ..." (paragraph 100).

116. Nevertheless, even if this is not a requirement by the ECtHR, when dealing with a disciplinary case where the sanction to be imposed can be the dismissal of the judge, attention should be paid to the evidence presented and try to assess it with special care, and if not "beyond any reasonable doubt" at least with a higher standard than the mere preponderance of evidence or "clear and convincing evidence" rule.

Recommendation

The standard of proof to impose a disciplinary sanction to a judge is not required to be the same as the standard to convict a defendant in a criminal procedure. Thus, invoking the standard of proof of "beyond any reasonable doubt" might run counter the adequate functioning of the disciplinary liability system for judges, representing an obstacle to impose any disciplinary sanction for not meeting the highest standard of proof. This being said, special attention should be given when the sanction to be imposed is the dismissal of the judge.

https://eucrim.eu/articles/disciplinary-sanctions-against-judges-punitive-but-not-criminal-for-the-strasbourg-court/

[27] *Ezeh and Connors v. the United Kingdom, Appl. nos. 39665/98 and 40086/98,* of 15 July 2002, and GC judgment of 9 October 2003.

5. Other relevant issues

Criteria for selection of the members of the inspection service and responsible for the disciplinary inquiry. The issue of the salary

117. The body responsible for the disciplinary inquiry according to Article 43 LHCJ shall be a disciplinary inspector, who is also appointed as rapporteur. This appointment pursuant to Article 43.1 LHCJ is done upon an automated system for distribution of cases. The preliminary check and the conclusions of the rapporteur together with other materials, shall be sent to the Disciplinary Chamber, and this body shall take the decision on opening or refusing to open a disciplinary proceeding. This decision on opening the disciplinary proceedings is not subject to appeal. "Once the disciplinary case is opened, the rapporteur prepares the case for consideration by the Disciplinary Chamber, identifies witnesses or other persons to be summoned or invited to take part in the meeting, and the like." (Article 48.1 LHCJ).

118. The appointment of the rapporteur of a disciplinary chamber does seem to comply with the necessary standards, as it shall be a member of the Disciplinary Chamber, who will not take later part in the decision of this body.

Recommendation

No recommendation is foreseen in this regard.

Scope of the judicial remedy

119. The decision of the HCJ can be challenged by way of appeal to a court. However, the grounds for this judicial remedy as set out in Article 52.1 LHCJ are quite limited:

> "1. The decision of the High Council of Justice following the consideration of the appeal against the decision of the Disciplinary Chamber may be further appealed and annulled only for the following reasons:
>
> 1) the members of the High Council of Justice who adopted the respective decision did not have the powers to do so;
> 2) the decision was not signed by any of the members of the High Council of Justice who approved it;
> 3) the judge was not duly notified of the session of the High Council of Justice if any of the decisions referred to in clauses 2-5 of part ten of Article 51 of this Law is made;
> 4) the decision does not have references to the grounds specified by the law for the grounds of disciplinary sanctions against the judge and does not define the reasons based on which the High Council of Justice reached its findings."

120. It is doubted that this reduced scope fulfils the requirements set out in the ECtHR's case-law, as it does only foresee formal procedural issues as grounds for appellate review. If the HCJ is not a disciplinary body that completely fulfils the requirements to be equalled to a tribunal in the sense of the ECHR, the case-law of the ECtHR requires in such cases that the decisions of the disciplinary body are subject to review by way of a judicial remedy.

121. As stated earlier[28] the ECtHR steadily has required that the judicial body reviewing the ruling of the disciplinary body shall have either full jurisdiction or the scope of the review shall be broad enough to revise the findings of the disciplinary body. In assessing the sufficiency of the judicial review, the Court stated that it must take into account three elements:

    1) the issues covered by the review carried out by the competent domestic court;
    2) the method of review adopted by the domestic court in reviewing the decision adopted by the disciplinary body, while addressing the question of the right to a hearing;
    3) the decision-making powers of the court in question for the purposes of concluding its review of the case before it, and to the reasoning of the decisions adopted.[29]

122. In the leading case *Ramos Nunes de Carvalho e Sá v. Portugal* the ECtHR concluded that a judicial body cannot be said to have full jurisdiction unless it has the power to assess whether the disciplinary sanction was proportionate to the misconduct (para. 202). However, this conclusion was subject to a separate opinion, which considered that the review carried out by the Supreme Court of Portugal satisfied the requirements of Article 6.1 ECHR. The judges filing the separate opinion were against the idea that the appeal against administrative decisions imposing disciplinary sanctions upon judges need to fulfil different function or have a broader scope. It is necessary to grant access to a court with full jurisdiction to be considered the review as sufficient, but not necessarily a re-examination of the case, especially on the facts and evidence relied on by the administrative authority. The separate opinion is in favour of keeping the distinction between "scrutiny and review" and "re-examination" and are against of creating a "lex specialis" on the scope of judicial review for judicial disciplinary proceedings" (paras. 21-28 of the separate opinion).

123. Despite the discussion on the scope of the judicial remedy, it seems that the limited grounds set out in Article 52.1 LHCJ do not comply with the requirement of full jurisdiction, and thus this provision should be amended in order to align with CoE standards.

Recommendation

Consider extending the scope of the judicial remedy provided to revise the decisions of the HCJ in disciplinary proceedings, since the current limited scope does not meet the Council of Europe requirements.

[28] See the 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, pp. 18 ff.

[29] *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], Appl. nos. 55391/13, 57728/13 and 74041/13, 6 November 2018, para. 199. On the scope of the judicial remedy in disciplinary proceedings see also *Vilho Eskelinen and Others v. Finland* [GC], Appl. no. 63235/00; *Denisov v. Ukraine* [GC], Appl. no. 76639/11, 25 September 2018; *Bilgen v. Turkey,* Appl. no. 1571/07, 9 March 2021; *Mnatsakanyan v. Armenia* (Appl. no. 2463/12*,* 6 December 2022.

Inspection services and disciplinary bodies

124. An inspection service is a service oversight body, not entrusted with the disciplinary functions, but with the general function of oversight of the quality of the service. The interplay of the disciplinary bodies and the inspection service is complementary since the inspection service may have an incidence in the accountability of the judges and the triggering of disciplinary proceedings. In general, being a monitoring body checking the performance of the courts (generally, not only of the judges), and to detect needs in terms of resources, it is often also the way to detect undue delays or low performance by individual judges. Since during the online meeting several members of the HCJ showed interest in this topic, it might be necessary to consider its further discussion.

Recommendation

Further analysis on the role and functions of the HCJ inspectors should be studied. As this falls out of the present report, focused on precise questions related to the disciplinary proceedings of judges, it should be confirmed what their possible impact in the functioning of the HCJ is and thus in the disciplinary liability proceedings.

Motivation of the decisions on disciplinary offences

125. The issue was raised whether the decisions of the disciplinary body have to be motivated as it is done for any judicial decision. In practice, the quality of the decisions passed by disciplinary bodies may be scrutinised in the substantive and the formal sense. The argument of the existence of objective and subjective elements of specific offences, thus contributing to a better visibility and understanding of the misconducts and its assessment. Decisions generally contain several pages, depending on the complexity of the circumstances that led to the initiation of disciplinary proceedings. However, the techniques of legal writing and reasoning of judgments in general is to be followed, especially in terms of presenting and explaining the views of the adjudicating disciplinary body regarding the coherent and consistent interpretation of the regulations, standards and sentencing. The practice shows that, in general, the disciplinary bodies tend to write and motivate their decisions in the same way as if they are done in court judgments.

Recommendation

Analyse the practice of other disciplinary bodies regarding the level of detail of the motivation of the decisions of the disciplinary bodies when imposing a sanction upon a judge. Consider adopting the same level of motivation as it is expected in judgments in criminal proceedings.

6. Summary of recommendations

126. The summary of recommendations formulated in the report is as follows:

a. In order to be able to assess the “unjustified” delays in exercising the judicial duties of a precise judge, set out under **Article 106.1 2) LJ** as a ground for disciplinary liability, consider establishing a clear workload distribution and a comparative analysis of the performance of judges – at least quantitative –,Only by comparison or providing for a clear disposal rate, the delays can be assessed as not justified.

b. Redraft **Article 106.1.1.3) LJ** to avoid resorting to general ethical standards as grounds for disciplinary sanctions and allow the ranking of the levels of sanctions when minor unethical conducts are committed. Otherwise, the proportionality principle could be infringed.

c. Include certain exceptions in **Article 106.1 5) LJ** for disciplinary offences related to the breach by a judge of secrecy of sensitive information known in the exercise of the professional functions; define better the scope of application.

d. **Article 106.1.15 LJ** should be amended to include as a ground for dismissal not only criminal convictions related to offences of corruption, but also other serious intentional criminal offences. Consider also whether the criminal conviction should already as a penalty include the dismissal of a judge, and therefore avoid duplicating proceedings to dismiss a judge once the criminal conviction has become final.

e. **Article 106.1, paras. 9,10,13, and 16 to 19 LJ**: Revise the wording of the provisions related to the obligation to declare assets and consider merging some of them for a better understanding and oversight. This might also aid in the future statistical classification of the disciplinary offences, if the failures to comply with declarations are contemplated jointly under the same heading.

f. The sanctioning system provided in **Article 109 LJ** leaves a too broad leeway to the disciplinary body to select the sanction, which increases the risk of arbitrariness, as well as the imposing of disproportionate sanctions. The lack of certainty and foreseeability of the type of sanction that might be imposed for each of the administrative offences is not advisable and should be corrected. It is recommended to amend Article 109 LJ following the arguments detailed above.

g. Revise the wording of **Article 110 LJ** so that each of the sanctions is expunged within the legally provided time limit, and this time limit is not extended because other offences were committed during the time the prior sanction is not expunged.

Article 107 LJ: Consider introducing the possibility of accepting disciplinary complaints when they appear to be grounded, even if the complainant does not include the relevant evidence with it. Consider revising the possibility of the HCJ to trigger the initiation of a disciplinary preliminary inquiry upon the information received by the inspection service or obtained in the performance of its own functions, as long as this does not contradict the findings in the Constitutional Court decision of 3.11.2020.

h. **Article 52.2 LHCJ**: There is the possibility to limit the standing of the complainant to challenge the decision of the HCJ before a court. While this is possible under the Council of Europe standards, since the complainant does not have a subjective right to get a judge sanctioned, it is for the national authorities to consider if according to the Ukrainian context, this is advisable. Elements to be taken into account to decide on this shall be, the need to provide trust in the judiciary, the workload of the HCJ and the courts, and the adequate functioning of the disciplinary proceedings.

i. The standard of proof to impose a disciplinary sanction to a judges is not required to be the same as the standard to convict a defendant in a criminal procedure. Thus, invoking the standard of proof of "beyond any reasonable doubt" might run counter the adequate functioning of the disciplinary liability system for judges, representing an obstacle to impose any disciplinary sanction for not meeting the highest standard of proof. This being said, special attention should be given when the sanction to be imposed is the dismissal of the judge.

j. **Article 52.1 LHCJ:** Consider extending the scope of the judicial remedy provided to revise the decisions of the HCJ in disciplinary proceedings, since the current limited scope does not meet the Council of Europe requirements.

k. Further analysis on the role and functions of the HCJ inspectors should be studied. As this falls out of the present report, focused on precise questions related to the disciplinary proceedings of judges, it should be confirmed what their possible impact in the functioning of the HCJ is and thus in the disciplinary liability proceedings.

l. Analyse the practice of other disciplinary bodies regarding the level of detail of the motivation of the decisions of the disciplinary bodies when imposing a sanction upon a judge. Consider adopting the same level of motivation as it is expected in judgments in criminal proceedings.

ANNEX

Overview of the rules on disciplinary offences in some other member States of the Council of Europe

Spain

Disciplinary liability of judges is regulated in the Law on the Judiciary (Articles 414-427 LJ). Conduct of judges against the principles of judicial integrity are typified as disciplinary offences. So, it can be affirmed that the prevention and sanction of inappropriate conducts of a judge, that do not entail criminal liability, takes place by way of the disciplinary liability system.

The Law on the Judiciary differentiates between very serious, serious and less serious disciplinary offences or infringements. The penalties that may be imposed for disciplinary offences are: 1) warning; 2) pecuniary fine up to 6.000 euros; 3) transfer to another court at least 100 km away; 4) suspension up to three years; and 4) dismissal (Article 420 LJ).

Less serious offences shall be sanctioned only with warning and pecuniary fine up to 500 euros; serious offences with pecuniary fines up to 6.000 euros; and transfer and dismissal may only be adopted in case of very serious disciplinary offences (Article 420.2 LJ).

Statute of limitations is: two years for very serious offences; one year for serious offences and approx. 6 months (this period may vary depending on the type of conduct) for the less serious offences. The sanctions imposed are cancelled: within 6 months the warning; and upon the request of the sanctioned judge: within 1 year for less serious offences; within 2 years for serious offences; and within 4 years in case of very serious offences, save the cases of dismissal. Once the sanction has been cancelled, it will be deleted from the judge's record as if it had never existed.

The law provides for a very detailed list of conducts that entail disciplinary liability. We will mention here the conducts that are typified as very serious offences, and briefly mention the most relevant ones under the classification of serious and less serious offences.[30]

Very serious disciplinary offences are (Article 417 LJ):

417.1 LJ: *Intentional breach of the principle of loyalty to the Constitution.*

(The law obliges judges to apply the Constitution, interpret every rule in conformity with the Constitution and to follow the rulings of the Constitutional Court. Not doing this willingly would constitute this disciplinary offence.)

417.2 LJ: *Affiliation to political parties, labour or trade unions or working for any of them.*

417.3 LJ: *Causing continuous conflicts with the authorities within the judicial district for reasons not related to the judicial functions.*

417.4 LJ*: Interfering with the judicial functions of other judges by giving instructions or exercising any pressure.*

[30] A complete list of the disciplinary offences can be found in the Annex provided by the Spanish GCJ, which contains the legal provisions on disciplinary offences.

417.5 LJ: *Actions or omissions that have ended up in the establishment of civil liability in a final judgment.*

417.6 LJ: *Exercising any of the activities which are incompatible with the judicial profession.*

417.7 LJ: *Omitting information relevant in cases of appointments for vacancies and so causing the appointment against incompatibilities provided in the law.*

417.8 LJ: *Knowingly not complying with the obligation to abstain in cases where there is a legal ground for self-recusal.*

417.9 LJ: *Reiterated neglect or unjustified delays in initiating, proceedings or deciding cases or in the exercise of any other judicial functions.*

(The practice on this disciplinary offence will be explained in detail, as it is one of the most often invoked grounds and where the case-law has tried to define exactly when a negligent conduct is present and what kind of delays may give rise to disciplinary sanctions.).

417.10 LJ: *Abandonment of post or unjustified absence for more than 7 days.*

417.11 LJ: *Willingly not telling the truth when applying for absence permits, compatibility declarations or economical allowances.*

417.12 LJ: *Revealing data known in the exercise of the judicial function, when this causes some kind of damage.*

417.13 LJ: *Abuse of the condition of judge in order to obtain any favourable treatment by authorities, public officials, or any professional.*

417.14 LJ: *Inexcusable ignorance in the fulfilment of the judicial functions.*

417.15 LJ*: Absolute lack of motivation of the judicial decisions that require it, if such lack of motivation has been found in a final judgment.*

(Spanish Constitution (Article 120.3) requires the motivation of the judgments, although for certain judicial decisions forms are admitted, as long they are adapted to the specific facts and circumstances of the case. To clarify when a disciplinary infringement may be found under this ground, the case-law of the Supreme Court has stated that: the lack of motivation has to be manifest, not allowing to know what the elements have been taken into account for the decision, and that this defect has been stated in a final judgment (Supreme Court, Administrative Chamber 2 March 2009). Thus, only an absolute lack of motivation would lead to this disciplinary offence.)

417.16 LJ: *Committing a third serious disciplinary offence, having been sanctioned for two other serious offences which are not cancelled yet.*

Serious disciplinary offences are (Article 418 LJ):

418.1 LJ: Lack of respect for superiors in the hierarchical order, in their presence, in writing addressed to them or with publicity.

418.2 LJ: Taking an interest, through any kind of recommendation, in the exercise of the jurisdictional activity of another judge or magistrate.

418.3 LJ: Direct congratulations or critics to the powers, authorities or public officials or official corporations for their acts, invoking the status of judge, or using this condition.

418.4 LJ: Correct the application or interpretation of the legal system made by the inferiors in the jurisdictional order, except when they act in the exercise of jurisdiction.

418.5 LJ: The excess or abuse of authority, or serious lack of consideration regarding citizens, institutions, secretaries, forensic doctors or the rest of the personnel at the service of the Administration of Justice, of the members of the Public Prosecutor's Office, lawyers and attorneys, graduates and officials of the Judicial Police.

418.6 LJ*:* The use in judicial resolutions of expressions that are unnecessary or inappropriate, extravagant or manifestly offensive or disrespectful from the point of view of legal reasoning. In this case, the General Council of the Judiciary will only proceed after deduced testimony or communication sent by the superior court with respect to the person who issued the resolution, and who is aware of it on appeal.

418.7 LJ: Stop promoting the demand for disciplinary responsibility that proceeds to the secretaries and subordinate auxiliary personnel, when they know or should know of the serious breach by them of the duties that correspond to them.

418.8 LJ: Reveal the judge or magistrate and outside the established judicial information channels, facts or data of which they know in the exercise of his function or on the occasion of it when it does not constitute the very serious offense of section 12 of article 417 of this law.

418.9 LJ*:* The abandonment of the service or the unjustified and continuous absence for more than three calendar days and less than seven from the headquarters of the judicial body in which the judge or magistrate is assigned.

418.10 LJ: Unjustified and repeated non-compliance with the public hearing schedule and unjustified non-attendance to the procedural acts with public hearing that were indicated, when it does not constitute a very serious offense.

418.11 LJ**:** The unjustified delay in the initiation or in the processing of the processes or causes that the judge or magistrate knows in the exercise of his function, if it does not constitute a very serious fault.

418.12 LJ: Repeated non-compliance or disregard for the requirements made by the General Council of the Judiciary, the President of the Supreme Court, the National Court and the Superior Courts of Justice or Government Chambers, or the hindering their inspection functions.

418.13 LJ*:* Failure to comply with the obligation to prepare a statement or list of pending issues in the case established in section 3 article 317 of this law.

418.14 LJ: The exercise of any activity considered compatible to that referred to in article 389.5 of this law, without obtaining, when provided, the pertinent authorization or having obtained it with lack of veracity in the alleged assumptions.

418.15 LJ: Unjustified abstention, when so declared by the Governing Chamber, in accordance with the provisions of article 221.3 of this law.

418.16 LJ: Adopt decisions that, with manifest procedural abuse, generate fictitious increases in the volume of work in relation to the measurement systems established by the General Council of the Judiciary.

418.17 LJ: Obstruct the work of the inspection service.

418.18 LJ**:** The commission of a minor offense having previously been penalized by firm resolution for two other minor offenses without having been canceled or the corresponding annotations cancelled, in accordance with the provisions of article 427.

Finally, **less serious disciplinary offences** (article 419 LJ) are the following:

419.1 LJ: Lack of respect for hierarchical superiors when the circumstances that would qualify the conduct as a serious misconduct do not exist.

419.2 LJ: Negligence or inconsideration with equals or inferiors in the hierarchical order, with citizens, members of the Public Prosecutor's Office, forensic doctors, lawyers and attorneys, social graduates, with secretaries or other personnel who provide services in the Judicial Office, or with officials of the Judicial Police.

419.3 LJ: The unjustified or unmotivated breach of the legally established deadlines for issuing a resolution in any kind of matter before the judge or magistrate.

419.4 LJ: The unjustified and continued absence for more than one calendar day and less than four from the headquarters of the judicial body in which the judge or magistrate is assigned.

419.5 LJ: The disregard of the requirements that in the exercise of their legitimate powers made by the General Council of the Judiciary, the President of the Supreme Court, the National Court and the Superior Courts of Justice or Government Chambers.

As to the interaction of criminal and disciplinary liability/proceedings, the rules determine that pending a criminal procedure, the disciplinary proceedings may continue, but no decision will be taken until the criminal procedure is finalized. The facts established as proofed in the criminal procedure, are binding for the subsequent disciplinary proceedings. Disciplinary liability can be imposed after a criminal sanction only upon another legal ground (Article 415 LJ).

Italy

Disciplinary offences and disciplinary sanctions against judges are regulated in the Legislative Decree of 23 February 2006.[31] This law contains a comprehensive list of disciplinary offences, differentiating those affecting the professional activity of the judge and separately those misconducts that are committed outside their functions, but that due to its impact in the judicial image can also entail disciplinary liability.

Section I - DISCIPLINARY OFFENSES

Article 1 (Duties of the magistrate)

1. The magistrate exercises the functions assigned to him with impartiality, correctness, diligence, industriousness, reserve and balance and respects the dignity of the person in the exercise of his functions.

2. The magistrate, even outside the exercise of his duties, must not engage in conduct, even if legitimate, which compromises the personal credibility, prestige and decorum of the magistrate or the prestige of the judicial institution.

[31] Decreto Legislativo 23 febbraio 2006 n. 109 (in Gazz. Uff., 21 marzo, n. 67). - Disciplina degli illeciti disciplinari dei magistrati, delle relative sanzioni e della procedura per la loro applicabilità, nonché 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.

3. The violations of the duties referred to in paragraphs 1 and 2 constitute a disciplinary offense which can be prosecuted in the cases provided for in articles 2, 3 and 4.

Article 2 (Disciplinary offenses in the exercise of functions)

1. The following constitute disciplinary offenses in the exercise of the functions:

a) without prejudice to the provisions of letters b) c), conduct which, in breach of the duties referred to in article 1, causes unjust damage or undue advantage to one of the parties;

b) the omission of communication, to the Superior Council of the Judiciary, of the existence of one of the situations of incompatibility referred to in articles 18 and 19 of the judicial system, referred to in Royal Decree 30 January 1941, n. 12, and subsequent modifications, as modified by article 29 of this decree;

c) knowingly failing to comply with the obligation to abstain in the cases envisaged by law;

d) habitually or seriously incorrect behavior towards the parties, their defenders, witnesses or anyone who has relations with the magistrate within the judicial office, or towards other magistrates or collaborators;

e) unjustified interference in the judicial activity of another magistrate;

f) the omitted communication to the head of the office, by the addressee magistrate, of the interferences that have occurred; g) the serious violation of the law caused by ignorance or inexcusable negligence;

h) the misrepresentation of the facts caused by inexcusable negligence;

i) the pursuit of ends extraneous to his duties and to the judicial function;

l) the issuance of measures lacking motivation, or whose motivation consists solely in the affirmation of the existence of the legal conditions without indication of the factual elements from which such existence results, when the motivation is required by law;

m) the adoption of measures adopted in cases not permitted by law, due to gross and inexcusable negligence, which have damaged personal rights or, significantly, property rights;

n) repeated or serious non-compliance with the regulatory provisions or provisions on the judicial service adopted by the competent bodies;

o) the undue assignment to others of activities falling within one's duties;

p) failure to comply with the obligation to reside in the municipality in which the office is located in the absence of the authorization required by law in force has resulted in concrete prejudice to the fulfillment of the duties of diligence and industriousness;

q) the repeated, serious and unjustified delay in carrying out the acts relating to the exercise of the functions; a delay that does not exceed three times the time limit established by law for the completion of the deed is presumed to be not serious, unless otherwise demonstrated;

r) habitually and unjustifiably withdrawing from service activity;

s) for the manager of the office or the president of a section or the president of a college, the omission to assign himself business and to draw up the relative provisions;

t) non-compliance with the obligation to be available for official purposes when it is imposed by law or by legitimate provision of the competent body;

u) the disclosure, even dependent on negligence, of procedural documents covered by secrecy or whose publication is prohibited, as well as the violation of the duty of confidentiality on the business in progress, or on the business completed, when it is suitable for unduly harm the rights of others;

v) public statements or interviews which, under any profile, concern the subjects for whatever reason involved in the business being discussed, or treated and not defined with a provision not subject to ordinary appeal;

z) maintaining relationships in relation to the activity of one's office with the information bodies outside the procedures established by the legislative decree issued in implementation of the delegation referred to in articles 1, paragraph 1, letter d) and 2, paragraph 4, of the law of 25 July 2005, n. 150;

aa) soliciting the publicity of information pertaining to one's office activity or establishing and using reserved or privileged personal information channels;

bb) issuing statements and interviews in violation of the balance and measurement criteria;

cc) the intentional adoption of provisions affected by clear incompatibility between the operative part and the reasoning, such as to manifest a pre-established and inexcusable.

2. Without prejudice to the provisions of paragraph 1, letters g), h), i), l), m), n), o), p), cc) and ff), the activity of interpreting provisions of law in compliance with Article 12 of the provisions on the law in general never gives rise to disciplinary liability.

Article 3 (Disciplinary offenses outside the exercise of functions)

1. The following constitute disciplinary offenses outside the exercise of functions;

a) the use of the quality of magistrate in order to obtain unjust advantages for oneself or for others;

b) associating with a person subjected to criminal or preventive proceedings in any case dealt with by the magistrate, or a person who it is clear to the latter has been declared a habitual, professional or tendency offender or has been sentenced for non-culpable crimes to imprisonment of more than three years or being subjected to a preventive measure, unless rehabilitation has taken place, or having conscious business relations with one of these persons;

c) the assumption of extrajudicial tasks without the prescribed authorization of the Superior Council of the Judiciary;

d) carrying out activities incompatible with the judicial function referred to in article 16, paragraph 1, of the Royal Decree of 30 January 1941, n. 12, and subsequent modifications, or of activities such as to cause concrete prejudice to the fulfillment of the duties governed by article 1;

e) obtaining, directly or indirectly, loans or concessions from subjects that the magistrate knows are parties or suspects in criminal or civil proceedings pending at the judicial office to which they belong or at another office located in the district of the Court of Appeal in which he exercises judicial functions, or from their defenders, as well as obtaining, directly or indirectly, loans or subsidies, under exceptionally favorable conditions, from injured parties or witnesses or in any case from subjects involved in said proceedings;

f) the public manifestation of consent or dissent in relation to a proceeding in progress when, due to the position of the magistrate or the methods with which the judgment is expressed, it is suitable to condition the freedom of decision in the proceeding itself;

g) participation in secret associations or associations whose bonds are objectively incompatible with the exercise of judicial functions;

h) membership or participation in political parties or involvement in the activities of political or operational centers in the financial sector which may condition the exercise of functions or in any case compromise the image of the magistrate;

i) the instrumental use of the quality which, due to the position of the magistrate or the methods of implementation, is suitable to disturb the exercise of constitutionally envisaged functions;

l) any other behavior such as to compromise the independence, impartiality and impartiality of the magistrate, even in terms of appearance.

Article 4 (Disciplinary offenses resulting from a crime)

1. The following constitute disciplinary offenses resulting from the offence:

a) the facts for which an irrevocable sentence has been issued or a sentence has been pronounced pursuant to article 444, paragraph 2, of the code of penal procedure, for intentional or unintentional crime, when the law establishes the custodial sentence alone or together with the sentence pecuniary;

b) the facts for which an irrevocable sentence has been issued or a sentence has been pronounced pursuant to article 444, paragraph 2, of the code of penal procedure, for a culpable crime, to the penalty of imprisonment, provided that, in terms of methods and consequences, they present particularly serious character;

c) the facts for which an irrevocable sentence has been issued or a sentence has been pronounced pursuant to article 444, paragraph 2 of the code of criminal procedure, to the penalty of arrest, provided that, due to the methods of execution, they present a particular character severity;

d) any fact constituting a crime capable of harming the image of the magistrate, even if the crime is extinguished for any cause or the penal action cannot be initiated or continued.

Section II - DISCIPLINARY SANCTIONS

Article 5 (Sanctions)

1. The magistrate who violates his duties is subject to the following disciplinary sanctions:

a) the warning;

b) reprimand;

c) loss of seniority;

d) temporary incapacity to exercise a managerial or semi-managerial role;

e) suspension from office from three months to two years;

f) removal.

2. When several sanctions of different seriousness must be imposed for the concurrence of several disciplinary offenses, the sanction foreseen for the more serious infringement is applied; when several disciplinary offences, committed in competition with each other, are punished with the same sanction, the immediately more serious sanction may be applied, alone or combined with the less serious one, if compatible.

Article 6 (Warning)

1. The admonition is a reminder, expressed in the operative part of the disciplinary decision, for the magistrate to observe his duties in relation to the offense committed.

Article 7 (Reprimand)

1. Reprimand is a formal statement of blame contained in the operative part of the disciplinary decision.

Article 8 (Loss of seniority)

1. The loss of seniority cannot be less than two months and cannot exceed two years.

Article 9 (Temporary incapacity to exercise a managerial or semi-managerial role)

1. The temporary incapacity to exercise a managerial or semi-managerial role cannot be less than six months and cannot exceed two years. If the magistrate performs directive or semi-directive functions, other non-directive or semi-directive functions corresponding to his qualification must be assigned to him by office.

2. Once the sanction has been applied, the magistrate cannot resume the exercise of managerial or semi-managerial functions at the office where he performed them prior to the disciplinary measure.

Article 10 (Suspension from office)

1. The suspension from functions consists in the removal from functions with the suspension of the salary and the placement of the magistrate outside the organic role of the judiciary.

2. The suspended magistrate is paid an alimony equal to two thirds of the salary and other continuing duties, if the magistrate is receiving the economic treatment reserved for the first, second or third salary class; half, if in the fourth or fifth class; to a third, if in the sixth or seventh class.

Article 11 (Removal)

1. Removal determines the termination of the service relationship and is carried out by decree of the President of the Republic.

Article 12 (Applicable sanctions)

1. A sanction no less than reprimand is applied for:

a) conduct which, in breach of the duties referred to in article 1, causes unjust damage or undue advantage to one of the parties;

b) conscious failure to comply with the obligation to abstain in the cases envisaged by law;

c) the omission, by the interested party, of the communication to the Superior Council of the Judiciary of the existence of one of the causes of incompatibility referred to in articles 18 and 19 of the judicial system, referred to in the Royal Decree of 30 January 1941, n. 12, as amended by article 29 of this decree;

d) adopt behaviors which, due to the relations in any case existing with the subjects involved in the proceeding or due to interferences that have occurred, constitute a violation of the duty of impartiality;

e) the conduct envisaged by article 2, paragraph 1, letters d), e) and f);

f) the pursuit of ends other than those of justice;

g) repeated or serious delay in carrying out the deeds relating to the exercise of functions;

h) lack of industriousness, if habitual;

i) serious or habitual breach of the duty of confidentiality;

l) the use of the quality of magistrate in order to obtain unjust advantages;

m) carrying out extrajudicial duties without having requested or obtained the prescribed authorization from the Superior Council of the Judiciary, if due to the size and nature of the task the fact does not appear to be particularly serious;

2. A penalty not less than the loss of seniority is applied for:

a) conduct which, in breach of the duties referred to in article 1, causes serious and unjust damage or undue advantage to one of the parties;

b) the use of the quality of magistrate in order to obtain unjust advantages, if habitual and serious;

c) the conduct envisaged by article 3, paragraph 1, letter b);

3. The sanction of incapacity to exercise a managerial or semi-managing function is applied due to the interference, in the activity of another magistrate, by the manager of the office or by the president of the section, if repeated or serious;

4. A sanction not lower than the suspension from functions is applied for the acceptance and performance of assignments and offices prohibited by law or for the acceptance and performance of assignments for which the prescribed authorization has not been requested or obtained, if due to the extent and nature of the assignment, the fact appears to be particularly serious.

5. The sanction of removal is applied to the magistrate who has been sentenced in disciplinary proceedings for the facts envisaged by article 3, paragraph 1, letter e), who incurs perpetual or temporary disqualification from public office following a criminal conviction or who incurs a prison sentence for negligent crime of not less than one year whose execution has not been suspended, pursuant to articles 163

and 164 of the Criminal Code or for which the suspension has been revoked pursuant to article 168 of the same Code.

Article 13 (Transfer of office and precautionary measures)

1. The disciplinary section of the Superior Council of Magistracy, in inflicting a sanction other than a warning or removal, may order the transfer of the magistrate to another seat or to another office when, due to the conduct held, the permanence in the same seat or in the same office it appears to be in contrast with the good performance of the administration of justice. The transfer is always ordered when one of the violations envisaged by article 2, paragraph 1, letter a) occurs, as well as in the case in which the sanction of suspension from functions is imposed.

2. In cases of disciplinary proceedings for charges punishable by a sanction other than a reprimand, at the request of the Minister of Justice or the Attorney General at the Court of Cassation, where there are serious grounds for the disciplinary action and there are reasons of particular urgency , the Disciplinary Section of the Superior Council of the Judiciary, on a precautionary and provisional basis, may order the transfer to another office or the assignment to other functions of the accused magistrate.

Portugal

The types of misbehaviours/offences committed by judges that may give rise to disciplinary proceedings are divided in three groups, regarding the individual circumstances of the violation: minor offences, serious offences and very serious offences.

These violations are codified in a specific piece of legislation dedicated to judges (which stipulate their rights, duties and the general rules applicable to the professional career), which is the Statute of Judicial Magistrates (SJM), established by Law no. 21/85, of 30 July, last amended by Law no. 2/2020, of 31 March.

There is no code of ethics for judges, since the ethical principles/values that may guide the actions of judges are stipulated in the SJM. For instance, judges are bound by their duty of professional secrecy, due diligence and politeness – articles 7-B, 7-C and 7-D of the SJM, respectively. However, the High Council for Judicial Magistrates (HCJM) recently announced that a draft code of ethics for judges is being drawn up, following recommendations made under the IV mutual evaluation of Portugal by GRECO (Group of States against Corruption, Council of Europe).

Regarding disciplinary responsibility, Article 82 of the SJM stipulates that any acts committed by a judge (with intent, recklessly or by serious negligence) in violation of the principles and duties set on the Statute constitute a disciplinary infraction/misbehaviour. In addition, any acts which, by their nature or repercussions, may be deemed as incompatible with the requirements of independence, impartiality and dignity (essential to the exercise of the profession) also constitute a disciplinary infraction/misbehaviour.

Article 83-G of the SJM sets the definition of very serious offence, which is "*any act committed by a judge with intent or gross negligence that, by its repetition or seriousness of the violation, is deemed improper for a good administration of justice or for the exercise of the profession*". This article provides for a non-exhaustive list of examples of conducts that may constitute a very serious offence, namely:

- the refusal to administer justice, with no valid reason;
- the abuse of the powers granted to a judge, in order to obtain personal advantages from public authorities, public officials or other professionals;
- the unjustified disclosure of facts or data acquired during the exercise of the profession (in violation of the duty of professional secrecy).

Article 83-H of the SJM sets the notion of serious offence, which is "*any act committed by a judge with intent or gross negligence, which unveil a lack of interest in complying with the professional duties*", such as the disregard for the sentences/judgements rendered by superior courts or the unjustified interference in the professional activities of another judge.

Article 83-I of the SJM sets the definition of minor offence, which is "*any act recklessly committed by a judge, which unveil a poor/inadequate understanding of the professional duties*", such as the exercise of another professional activity – compatible with the profession of judge – without the required prior authorization.

Slovenia

Disciplinary responsibility and disciplinary sanctions for judges are determined by the **Judicial Service Act** (Zakon o sodniški službi).[32] Criminal liability and liability for a misdemeanour shall not exclude a disciplinary liability on the part of the judge.[33]

According to the Judicial Service Act a disciplinary sanction may be pronounced upon a judge who willfully or by negligence breaches the judicial duties prescribed by law and the Court Rules, or irregularly performs judicial service.

The main acts that entail a breach of judicial duties or irregular performance of judicial service are:

1. commission of an act that has the statutory definition of a criminal offence while holding judicial office;
2. failure to carry out judicial duties or unjustifiable refusal thereof;
3. unconscientious, late, inappropriate or negligent performance of judicial service;
4. illegal or inappropriate disposal of resources;
5. disclosure of official secrets and other confidential information defined by law or the Court Rules;
6. abuse of status or transgression of official authorisations;
7. abuse of the right to absence from work;
8. failure to achieve the expected work results for more than three months consecutively without justifiable grounds;

[32] Judicial Service Act, Official Gazette of the Republic of Slovenia, Nos. 94/07 – official consolidated text, 91/09, 33/11, 46/13, 63/13 in 69/13 – corrigendum, 95/14 – ZUPPJS15, 17/15, 23/17 – ZSSve and 36/19 – ZDT-1C)); http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO334 (Slovenian version)

[33] See the Judicial Service Act, Chapter VII – Disciplinary Proceedings and Suspensions from Judicial Service.

9. breach of the case roster or priority handling of cases defined by law or the Court Rules;
10. performance of functions, work or activities incompatible with judicial office pursuant to the Constitution and law;
11. failure to notify the president of the court regarding the acceptance of work assessed as incompatible with judicial office;
12. failure to report existing legal grounds for the exclusion of the judge or continuation of work on a case in which there are grounds for exclusion;
13. advance public expression in a judicial case that is sub judice or in a case in which extraordinary legal remedies have been lodged;
14. action or behaviour on the part of the judge that conflicts with the judge's impartiality or that damages the reputation of the judicial profession;
15. inappropriate, undignified or insulting behaviour or language towards individuals, state bodies and legal persons in relation to the performance of judicial service or outside it;
16. obstruction of the functioning of the court in order for the judge's own rights to be exercised;
17. acceptance of gifts or other benefits related to judicial service;
18. failure to submit information on financial status or late submission thereof;
19. breach or omission of mentoring duties;
20. failure to observe decisions issued on the judge's transfer or assignment;
21. prevention of obstruction of the implementation of the provisions of the act governing official supervision of judges' work and supervisory appeals;
22. dealings with parties, their representatives and other persons that are in conflict with the provisions of the Court Rules;
23. failure to observe measures for the regular and effective execution of judicial power;
24. breach or omission of measures pursuant to the programme for resolving the backlog at the court;
25. failure to fulfil the duties of professional education;
26. breach of safety at work regulations;
27. breach of the provisions of the Court Rules on the use of official robe.

The acts pursuant to points 1, 2, 3, 5, 6, 8, 10, 12, 13, 17, 18, 20, 21, 23 and 24 shall entail a serious breach of discipline and the act according to point 14 only if it has serious consequences for the judge's impartiality or that damages the reputation of the judicial profession. According to the Judicial Service Act a serious breach of discipline caused a termination of judicial office as a judge is no longer suited to holding judicial office.

The Code of Judicial Ethics (Kodeks sodniške etike)[34] establishes rules for the professional and personal conduct of judges with a view to protecting their independence, impartiality and honesty and the good reputation of the judicial service. Judges are obliged to comply with the Code of judicial ethics both in the performance of judicial office and outside of it. Although judges are bound by the principles of the Code in performing judicial duties, the purpose of these principles is not to establish a judge's disciplinary, criminal or civil accountability. Non-compliance

[34] The Code of Judicial Ethics with commentary available at: http://www.sodni-svet.si/images/stories/Kodeks_sodniske_etike_komentar_ang_sept_2017.pdf (English version)

with or a violation of one of the principles of the Code does not automatically imply a disciplinary offence, civil offence or criminal offence. Furthermore, the principles of the Code cannot be a means of establishing judges' responsibility for decisions taken in judicial proceedings. In view of the constitutional right to an independent and impartial trial, the material aspects of a trial (i.e. findings regarding the merits of the case under judicial consideration) are beyond the system of judicial discipline and fall within the scope of proceedings concerning ordinary and extraordinary legal remedies.

Germany

Germany is an outlier in terms of rules on disciplinary offences because the laws on the judiciary do not provide a list of disciplinary offences applicable to the judges. In that sense Germany follows an "old" model, based on the idea that judges are part of the civil service. Although the judicial independence is recognized in its Constitution (*Grundgesetz*), and the duty to preserve the judicial independence is regulated and underlined in the judiciary Act, the whole system on self-governing and disciplinary liability is still based in the traditional Prussian model of a hierarchical structure within the civil service.

The provisions of the German Judiciary Act (*Deutsches Richtergesetz* - DRiG) apply to *professional judges.* [35] The German Judiciary Act does not make its own regulations for the procedure in disciplinary cases. In accordance with section 63 subsection 1 of the DRiG, rather, the provisions of the Federal Discipline Act apply mutatis mutandis. The general framework for disciplinary offences and proceedings for judges in Germany is almost the same as for other civil servants and it is contained in the *Bundesbeamtengesetz* – BBG (Act on Federal Public Office) and the *Bundesdisziplinargesetz* - BDG *(*Federal Discipline Act) of 9 July 2001.[36] These laws contain the sanctioning system for misconduct of any public official. The decisions on disciplinary infringements are handed down in the case of Federal judges by the *service court of the Federation* (section 61 et seq. of the DRiG), and, in the case of the judges of a Land, by a *service court of this Land* (sections 77 ff. of the DRiG).

[35] 8 September 1961 (Federal Law Gazette Part I p. 1665)

[36] The Act entered into force on 1 January 2002 and replaced the Federal Disciplinary Code (*Bundesdisziplinarordnung* - BDO) applicable previously.