

DISCIPLINARY RESPONSIBILITY OF JUDGES (USING THE EXAMPLE OF UKRAINE)

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ABSTRACT

The issues of ensuring the independence of judicial power, as well as adherence to the judicial ethics by the repositories of judicial power, have been, remain and will be a priority for any country trying to integrate itself into the European Union. Such states also include Ukraine, which, in pursuit of this goal, has undertaken responsibilities to strengthen democracy and the rule of law, as well as to ensure respect for human rights and independence of the court. As a result, in 2016, the Great Judicial Reform was launched in Ukraine, which also covered the issues of disciplinary responsibility of judges. The experience of Ukraine that was analyzed in this research can be useful both for countries that are on the path of European integration and for the countries that are the members of the European Union as well.

Key words: Disciplinary Responsibility of Judges, Independence of Judges, High Council of Justice.

INTRODUCTION

Judicial power is proclaimed to be an independent branch of the state power in Ukraine. Thus, according to the Constitution of Ukraine (Article 126), judicial bodies perform their function regardless of the legislative and executive power, within the limits determined by the Constitution and in accordance with Ukraine's relevant statutory instruments.

According to the current legislation, the judicial power in Ukraine is implemented by administering justice. Justice, legitimacy and independence are the main principles of administering justice. Instead, the practice of judicial procedure and the level of public confidence in the judicial power indicate that these principles are more declarative than their implementation. Only a state body that has necessary power can make this situation better.

The High Council of Justice is such a body in Ukraine. It is lodged with exclusive powers to bring judges to disciplinary responsibility.

The relevance of researching the problems concerning ensuring implementation of disciplinary proceedings against a judge by the High Council of Justice is explained by the following factors: firstly, the society needs such judicial authorities that people will trust in, and fair disciplinary practice against judges will inevitably have a positive effect on the process of restoring people's confidence towards courts; secondly, Ukraine is now on the path of European integration, that is why a judicial system, which activity will meet the standards of the European Union must be formed.

Adoption of the Law of Ukraine “On the Judiciary and Status of Judges” (Legislation of Ukraine, 2016) and the Law of Ukraine “On the High Council of Justice” (Legislation of Ukraine, 2016) is one of the main stages of the so-called Great Judicial Reform. It solves a number of topical, important and problematic issues related to bringing judges to disciplinary responsibility. However, in the process of analyzing these normative acts, it should be noted that there are a number of gaps and miscalculations that contribute to unjustified refusals to consider a complaint, delaying the process of considering a complaint and creating problems to appeal against a decision of a disciplinary body. Which, in turn, cannot fully ensure judicial officials’ adherence to the rules of judicial ethics?

LITERATURE REVIEW

The issues of judges’ legal responsibility, including disciplinary one, were many times the subject of debate both among the representatives of judicature themselves, and among scholars who have considered the legal status of judges in some way as well. Honcharenko (2011) draws attention to the issue of ensuring the effectiveness of the mechanism of bringing judges to responsibility for the ascertained facts of their law violation, because it positively affects the level of public trust in judiciary and guarantees the proper functioning of the judicial system. Shevchenko (2014) emphasizes that the use of disciplinary measures (or the possibility of their application) is not the only, but rather effective method of counteracting judges’ violation of discipline. Lutsiuk (2017) States that the quality of justice directly depends on judges’ professional level and responsibility, the adherence to ethical standards and compliance with professional requirements.

It should be noted that the papers of the mentioned scholars, as well as the other scientists who have studied the investigated issues, have high scientific and practical value. And still the development of legislation regulating judges’ disciplinary responsibility, predetermines the necessity to rethink a number of scientific and theoretical provisions concerning the essence of this type of legal responsibility, as well as to identify the drawbacks in both legal regulation and implementation mechanism.

FINDINGS AND DISCUSSIONS

General Characteristics of the High Council of Justice and the Procedure of its Forming

According to the Article 1 of the Law of Ukraine “On the High Council of Justice” (Legislation of Ukraine, 2016) the High Council of Justice is a collegial, independent constitutional body of state power and judicial administration, which acts in Ukraine permanently in order to ensure the independence of the judiciary, its functioning on the basis of responsibility, answerability to the society, formation of a moral and highly professional judicature, adherence to the norms of the Constitution and laws of Ukraine, as well as professional ethics in judges and prosecutors’ activities.

Creating the High Council of Justice (hereinafter referred to as the HCJ) was one of the tasks of Great Judicial Reform in Ukraine in 2016. There was a need to create a new state body capable of protecting the judicial power in general, and the judges in particular, from any influence of different subjects. That is why the Constitution of Ukraine was amended and the Law of Ukraine “*On the High Council of Justice*” (2016) was adopted in order to oblige the High Council of Law that was in force at that time to make a decision on reorganization of the High Council of Law into the High Council of Justice.

It should be noted that the Law of Ukraine “*On the High Council of Justice*” (2016) enshrines a much larger list of powers than it is prescribed by the Constitution of Ukraine. As for the powers to bring judges to disciplinary responsibility, the Article 3 of the mentioned Law defines exactly the following ones:

- Ensuring disciplinary proceedings against judges by a disciplinary body;
- Creating bodies that will hear the cases concerning judges’ disciplinary responsibility;
- It considers appeals against the decision of the appropriate bodies to bring a judge or a prosecutor to disciplinary responsibility;
- It gives a decision temporary remove a judge from the process of administering justice;
- It takes measures in order to ensure the authority of justice and judges’ independence. (Legislation of Ukraine, 2016).

The analysis of these powers allows us to state that the High Council of Justice is the only disciplinary body concerning judges, as well as the sole controlling entity in respect of law and ethics while maintaining judges and prosecutors’ activities. It should be noted that before the judicial reform in 2016, there were two state bodies that were empowered to bring judges to disciplinary responsibility. They were the High Council of Law for the judges of Higher Specialized Courts and the Supreme Court of Ukraine and the High Qualification Commission of Judges of Ukraine for the judges of Local Courts and the Courts of Appeal. Reducing the number of subjects empowered to bring judges to disciplinary responsibility has simplified the mechanism for appealing a judge’s actions and reduced the risk of corruption, and may therefore be considered as a positive moment of such a reform.

Ensuring the effective functioning of the HCJ as an independent and autonomous body capable of making objective and impartial decisions regarding the courts staffing and bringing judges to disciplinary responsibility depends, of course, on the qualitatively formed structure of this body. In accordance with Article 5 of the Law of Ukraine “*On the High Council of Justice*” the HCJ consists of twenty-one members, ten of which are elected by the Congress of Judges of Ukraine from judges or retired judges, two are appointed by the President of Ukraine, two are elected by the Verkhovna Rada of Ukraine, two are elected by the Congress of Lawyers of Ukraine, two are elected by the All-Ukrainian Conference of Prosecutors and two are elected by a congress of the representatives of law higher educational institutions and scientific institutions (Legislation of Ukraine, 2016). Therefore, the procedure for forming the HCJ is based on the provision corresponding to paragraph 16 of the Conclusion No. 10 (2007) of the Advisory Council of European Judges, for the attention of the Committee of Ministers of the Council of Europe on the Judicial Council serving the public (Strasbourg, November 21-23, 2017). Namely at least half of the members of this body must consist of judges elected by the judicial power itself. It is one of those ways to form the HCJ that is able to ensure the creation of a politically independent entity, first of all, from the President of Ukraine, from the People’s Deputies of Ukraine, as well as from the members of the Cabinet of Ministers of Ukraine. The idea of 50% structure of the body conducting disciplinary proceedings against judges is also set out in Paragraph 5 of the European Charter “*On the Status of Judges*”. Undoubtedly, the High Council of Justice should consist of the staff which knows the peculiarities of judicial activity and is prepared to ensure implementation the rules of judicial ethics and the principles of justice, including judges’ independence.

Taking the above into account, it can be concluded that only in the presence of the above mentioned disciplinary powers and subject to the described mechanism of the HCJ forming its effective functioning can be ensured. In this case, as an independent and autonomous body capable of making objective and impartial decisions regarding the staffing of the courts and

bringing the judges to disciplinary responsibility, it will also enable the judges to observe the rules of judicial ethics.

Procedure for Disciplinary Proceedings Against a Judge

The Law of Ukraine “On the High Council of Justice” (Legislation of Ukraine, 2016) prescribes in detail the procedure for considering disciplinary complaints against judges and at the same time it establishes the necessary guarantees for judges’ protection in the process of disciplinary proceedings, which meet the standard of fair trial that is set out in the Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Three Disciplinary Chambers have been formed and are functioning, serving as the primary disciplinary body in the High Council of Justice. The decision of each Disciplinary Chamber may be appealed by a judge to the High Council of Justice. The Disciplinary Chamber must adjudicate only on the grounds specified in the Article 106 of the Law of Ukraine “On the Judiciary and Status of Judges” (Legislation of Ukraine, 2016).

According to the Clause 5.1 of the European Charter “On the Status of Judges”, judges’ responsibility is the consequence of mere their non-fulfillment of duties, proximately (directly) provided by law.

While deciding whether to bring a judge to disciplinary responsibility according to the Part 1 of the Article 109 of the current Law of Ukraine “*On the Judiciary and Status of Judges*” (Legislation of Ukraine, 2016), he/she may be subject to disciplinary sanction in the form of:

1. A warning;
2. A reprimand including the deprivation of the right to receive additional payments to a judge’s salary within one month;
3. A strict reprimand including the deprivation of the right to receive additional payments to a judge’s salary within three months;
4. A submission of temporary (from one till six months) suspension from administering justice including the deprivation of the right to receive additional payments to a judge’s salary and obligatory sending a judge to the National School of Judges of Ukraine in order to complete a refresher course determined by the body conducting disciplinary proceedings against judges, and further qualifying assessment in order to confirm judge's ability to administer justice in a relevant court;
5. A submission of transferring a judge to a lower court;
6. A submission for judge’s dismissal (Legislation of Ukraine, 2016).

If we analyze the activities of the HCJ Disciplinary Chambers for the period of 2017–2019, it should be noted that the number of cases of imposing sanctions on judges increases every year. So, in 2017 96 sanctions were imposed, in 2018 there were 176 sanctions and for the first 5 months of 2019 98 sanctions were imposed (Figure 1).

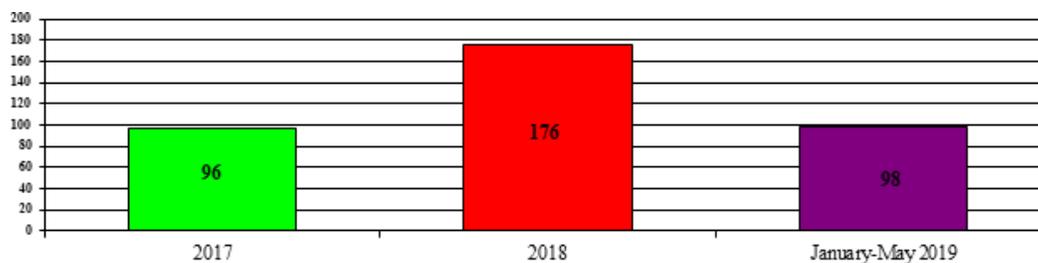


FIGURE 1
NUMBER OF DISCIPLINARY SANCTIONS IMPOSED ON JUDGES (2017-2019)

Quantitative characteristics of the types of sanctions imposed on judges in January-May 2019 should also be noted and compared with those in 2017 and 2018: 1) warnings – 26 (82 in 2018 and 17 in 2017); 2) reprimands including the deprivation of the right to receive additional payments to a judge’s salary within one month - 20 (27 in 2018 and 7 in 2017); 3) strict reprimands including the deprivation of the right to receive additional payments to a judge’s salary within three months – 7 (21 in 2018 and 8 in 2017); 4) submissions of temporary (from one till six months) suspension from administering justice including the deprivation of the right to receive additional payments to a judge’s salary and obligatory sending a judge to the National School of Judges of Ukraine in order to complete a refresher course determined by the body conducting disciplinary proceedings against judges, and further qualifying assessment in order to confirm judge’s ability to administer justice in a relevant court – 6 (11 in 2018 and 10 in 2017); 5) submissions of transferring a judge to a lower court – 0 (0 in 2018 and 0 in 2017); 6) submissions for judge’s dismissal – 39 (35 in 2018 and 54 in 2017) (Figure 2).

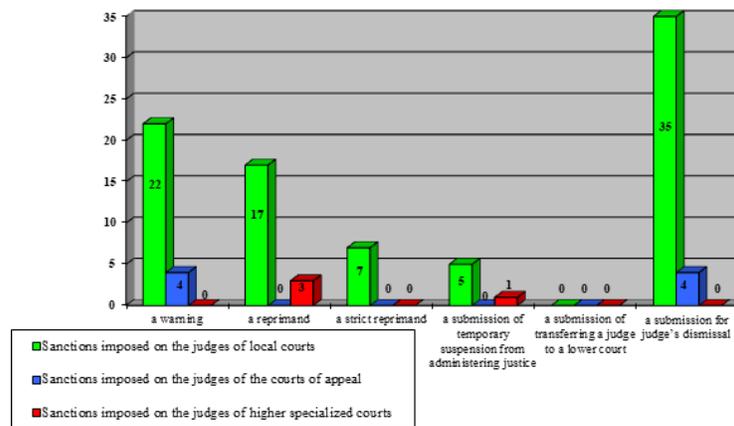


FIGURE 2
TYPES OF DISCIPLINARY SANCTIONS IMPOSED ON JUDGES (JANUARY-MAY 2019)

It should be emphasized that prior to March 28, 2015, the previous versions of the relevant Law provided for only one type of disciplinary sanction. It was a reprimand. However, a judge could have been released for breaking an oath; instead, such dismissal was not considered to be a disciplinary sanction because it was not on the list. In 2014, 4 such decisions were made, and in 2015 there were 6 such cases.

Problems of Disciplinary Responsibility of a Judge and Ways of their Solution

The analysis of legal grounds for applying disciplinary sanctions to judges, processing of statistics on the number of disciplinary sanctions and their types, studying practice of disciplinary sanctions allowed to identify a number of problematic issues in this area. So, the HCJ indicators of imposing disciplinary sanctions on judges are increasing each year. It happens in that period when the reboot of the judicial system is almost complete. It means that there is either a problem with the activity of the High Qualification Commission of Judges of Ukraine concerning selection of judges of Ukraine, or the HCJ in this way is trying to form judges’ dependence on this body. It is unacceptable on the basis of a number of international norms, in particular the European

Regulations of a Judge (European Association of Judges, 1993), and also taking into account Recommendations of the Committee of Ministers of the Council of Europe and the Conclusions of the Consultative Council of European Judges.

Disciplinary Chambers of the HCJ apply a limited list of disciplinary sanctions. For example, they have never applied a sanction in the form of a submission of transferring a judge to a lower court during their entire activity. This issue is problematic because no detailed procedure for such transferring judges is defined at the regulatory level. That is why such a mechanism should be developed and implemented.

There is a need to solve the problem of unequal use of disciplinary sanctions for such disciplinary offenses made by judges. As a consequence, there is a practice of applying less severe sanctions for more serious offenses and vice versa.

There is a practice of unsubstantiated applying sanctions by the Disciplinary Chambers of the HCJ, which are subsequently abolished by the HCJ itself. Thus, the HCJ abolished 5 sanctions imposed by the Disciplinary Chambers only during the period from January till May 2019. In comparison, in 2017 the HCJ abolished 19 penalties, and in 2018 17 penalties were abolished.

One of the problems in disciplinary practice is delaying the deadlines for considering complaints against decisions of the Disciplinary Chambers of the HCJ. So practice shows that such complaints may be considered for more than 6 months, although the legislation sets a maximum term of 120 days.

The current legislation does not disclose the essence of many concepts, such as “*intent*”, “*negligence*” and “*obvious negligence*”. This is negatively reflected in the disciplinary practice of the HCJ, since it is under these conditions that the mentioned entity is empowered to interpret and apply these terms while considering a disciplinary case.

It is also worth noting some changes concerning the grounds and procedure for laying complaints in order to bring a judge to disciplinary responsibility. Firstly, such reason as breaking the oath for dismissal a judge is excluded. Secondly, a judge can now be dismissed for breaking his duty to confirm the legality of the property source.

RECCOMENDATIONS

Therefore, in order to solve the aforementioned problems, it is advisable to eliminate gaps in the legislation concerning disciplinary responsibility of judges, it is necessary to define both a clear procedure for bringing judges to disciplinary responsibility and a mechanism for imposing one or another penalty. The order of determining an appropriate sanction for a specific offense is required. There is a need to impose responsibility on the HCJ members for improper disciplinary practice, in particular for delaying the terms for disciplinary proceedings. It would also be advisable to involve the public in the work of the HCJ concerning issues of bringing judges to disciplinary responsibility, which in turn would maintain public control over the activities of the HCJ. In order to create an effective institute of disciplinary responsibility for judges, it is necessary to take into account the provisions of the Recommendations of the Committee of Ministers of the Council of Europe and the Conclusions of the Consultative Council of European Judges.

CONCLUSIONS

The judicial power of Ukraine is in the process of reforming. In order it to meet all the expectations of society, it is necessary to pay attention to all gaps in legislation and the problems

in law enforcement.

Conducted research gave an opportunity to draw the following conclusions:

1. Expanding the authority of the HCJ should ensure its effective functioning as an independent and autonomous body capable of making objective and impartial decisions concerning the staffing of courts and bringing judges to disciplinary responsibility, as well as the ability to control compliance with law and ethics in judges' activities.

The new order for forming the High Council of Justice is based on an important provision that is consistent with the Council of Europe standard on the structure of judicial councils. It states, namely, that at least half of the members of this body must be judges elected by the judges themselves.

2. The High Council of Justice is a collegial, independent constitutional body of state power, which performs the functions stipulated by the Law of Ukraine "On the High Council of Justice" dated 03.10.2017. Empowering the High Council of Justice to dismiss, transfer, disbar judges and submit a motion for their appointment to the President of Ukraine became the novelty of the current legislation. The HCJ also has the right to give its consent for judges' detention and arrest. The right to bring judges of local courts and courts of appeal to disciplinary responsibility has passed from the High Qualification Commission of Judges of Ukraine to the HCJ.

3. Having analyzed the judicial reform, it can be noted that it has both its own positive and negative sides. Positive ones are: creation of a new body of judicial power, namely the High Council of Justice and the extension of the grounds for disciplinary responsibility of judges from 14 till 19. At the same time, there is a number of gaps and problems that cannot be solved without implementing methods proposed by us.

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