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Review Article

THE PROCEDURE OF DISMISSAL OF A JUDGE UNDER THE DISCIPLINARY PROCEDURE IN THE SYSTEM OF GUARANTEES OF HIS/HER INDEPENDENCE: STANDARDS OF EUROPEAN JUDICIAL PRACTICE AND LEGAL REGULATION IN UKRAINE

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ABSTRACT

Background: *The article focuses on the issues and gaps in the legal regulation and practice of applying procedures for terminating the status of Ukrainian judges as a result of disciplinary liability. The study employs a combination of general and specific research methods, grounded in a philosophical approach, to understand the essence, nature, and particularities of national practice in light of European judicial law standards. By analysing the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), the article demonstrates that European legal frameworks have established comprehensive standards for due process in disciplinary proceedings leading to the dismissal of judges. However, an analysis of the Ukrainian legal system for dismissing judges reveals significant inconsistencies with these European approaches.*

It is argued that Ukraine's current legal framework for judicial dismissal following disciplinary proceedings fails to enhance judicial transparency and does not fully align with the national constitution, European Union standards, or international legal norms. Considering Ukraine's ambition to further integrate into the European Union, the article stresses the importance of adopting best practices and reforming the legal framework governing judicial dismissals due to disciplinary offences that render judges unfit to remain in office.

Methods: *The authors utilised a range of scientific research methods, including dialectic reasoning, observation, synthesis, analogy, and both inductive and deductive analysis. Formal and formal-legal methods were employed to understand the structure, objectives, and nature of the dismissal procedure for judges. A systematic analysis method was applied to*

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search for and review relevant case law, especially from the ECtHR and CJEU. The study's conclusions are drawn from empirical material, providing a comprehensive understanding of both theoretical and practical aspects.

Results and Conclusions: *The research results provide scientifically grounded proposals for improving the legislative framework governing the dismissal of judges following disciplinary proceedings. These proposals are developed in line with the legal approaches of the European Court of Human Rights and the Court of Justice of the European Union, particularly concerning protecting judges' rights as public officials and ensuring the guarantees of judicial independence.*

The practical significance of the study is reflected in specific recommendations aimed at optimising the process of dismissing judges from office, clarifying the legitimate objectives behind such changes, and improving the functioning of the High Council of Justice in evaluating the grounds and procedures for dismissals resulting from disciplinary offences. A key recommendation is introducing the ***"beyond reasonable doubt"*** *standard of proof in disciplinary proceedings against judges, particularly in cases where their dismissal is being considered. This higher standard of proof would strengthen judicial independence by ensuring that dismissals are not the result of arbitrary or politically motivated decisions but are based on solid, substantiated evidence.*

The article emphasises the importance of these reforms for Ukraine's legal system, not only in aligning with European legal standards but also in enhancing the transparency, fairness, and independence of the judiciary in Ukraine.

1 INTRODUCTION

Modern democratic states have established numerous safeguards to guarantee both the independence of the judiciary and the competence of those who wield judicial authority. In this regard, both the conclusions of the Venice Commission and the jurisprudence of international courts highlight the adoption of two distinct standards concerning judicial accountability.[1] In the so-called "old democracies," the principle of judicial irremovability is nearly absolute, and disciplinary measures are viewed as a potential instrument of undue pressure on judges, posing a risk to judicial independence. European legal doctrine clearly recognises the importance of safeguarding against arbitrary dismissal and protecting the irremovability of judges as essential components in preserving judicial independence.

The European Court of Human Rights (ECtHR) has, on multiple occasions, adjudicated cases involving the independence and irremovability of judges. For instance, in *Baka v. Hungary* (2016), *Campbell and Fell v. the United Kingdom* (1984), and *Kleyn and Others v. the Netherlands* (2003), the Court unequivocally underscored the significance of judicial irremovability as a crucial factor in ensuring a fair trial, judicial independence, and

1 Piotr Mikuli and Grzegorz Kuca (eds), *Accountability and the Law: Rights, Authority and Transparency of Public Power* (Routledge 2021) doi:10.4324/9781003168331.

protection from unjustified dismissal.[2] Similarly, the Court of Justice of the European Union (CJEU) has taken an analogous stance. Notably, in the cases of *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas* (2018) and *European Commission v. Republic of Poland* (2019), the CJEU emphasised that the dismissal of judges should not be used as a tool to exert influence over the judiciary.[3]

It appears that the prevailing consensus among legal scholars and judicial bodies is that the complex process involved in the removal of judges serves as an additional layer of protection for judicial independence.

In our view, the primary aim of guaranteeing judicial irremovability is to uphold the autonomy, independence, and unique status of judges while shielding them from arbitrary interpretations of dismissal grounds and any external interference in their professional careers. This approach appears particularly justified in societies where democratic values, legal culture, and the rule of law are deeply rooted. However, in emerging democracies, where a fully developed legal culture is still evolving, greater emphasis is placed on specific legal safeguards to protect the judiciary from individuals whose behaviour fails to meet reasonable expectations necessary for maintaining judicial authority and public trust.

For instance, the Constitution of Ukraine enshrines the principle of judicial irremovability.[4] Article 126 ensures the immutability of judges' powers and specifies exclusive grounds for dismissal, such as the commission of a serious disciplinary offence, gross or systematic neglect of duties incompatible with the judicial role, or behaviour that reveals an incompatibility with the office held. Article 126 further recognises that deviations from the principle of irremovability arise from the intrinsic nature of the judge's position as an independent arbiter in legal disputes. In line with international standards governing the legal status of judges, such deviations are permissible under certain conditions: (a) when the judge's conduct makes it untenable for them to remain in office or (b) when the judge is unable to perform their duties for various reasons.

If additional guarantees of judicial immunity are genuinely aimed at ensuring impartial justice, they are legitimate and constitutionally protected, just as other fundamental legal values are. Nonetheless, these same constitutional objectives may also provide grounds for

2 *Baka v Hungary* App no 20261/12 (ECtHR, 23 June 2016) <https://hudoc.echr.coe.int/fre?i=001-163113> accessed 10 September 2024; *Campbell and Fell v the United Kingdom* App nos 7819/77; 7878/77 (ECtHR, 28 June 1984) <https://hudoc.echr.coe.int/eng?i=001-57456> accessed 10 September 2024; *Kleyn and Others v the Netherlands* App nos 39343/98, 39651/98, 43147/98, 46664/99 (ECtHR, 6 May 2003) <https://hudoc.echr.coe.int/fre?i=001-61077> accessed 10 September 2024.

3 Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* (CJEU, 27 February 2018) <https://curia.europa.eu/juris/liste.jsf?num=C-64/16> accessed 10 September 2024; Case C-619/18 *European Commission v Republic of Poland* (CJEU, 24 June 2019) <https://curia.europa.eu/juris/liste.jsf?num=C-619/18> accessed 10 September 2024.

4 Constitution of Ukraine no 254 k/96-BP of 28 June 1996 (amended 1 January 2020) <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 10 September 2024.

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imposing stricter legal accountability on judges compared to other citizens. This trend reflects the current phase of Ukraine's state development.

On the one hand, judges are dismissed or have their powers terminated on more limited grounds compared to the broader conditions applied under labour law for other citizens, such as officials and employees. This indicates a level of immunity for judges within the sphere of labour relations. On the other hand, judges can be removed from office for violations of the Code of Professional Ethics,[5] which involves a more subjective evaluation of the grounds for dismissal, as outlined in pt. 6, para. 3 of Art. 126 of the Constitution of Ukraine. These examples suggest that the institution of judicial irremovability establishes a dual set of legal norms—some more lenient, others more stringent.

Therefore, the legal provisions governing judges' labour rights, or their right to professional activity, operate under a distinct framework tailored to the higher objective of ensuring independent, impartial, and competent judicial proceedings. However, the disciplinary practices among Ukrainian judges reveal inconsistencies in how identical misconduct—defined as "incompatible with continuing to hold judicial office"—is interpreted. This inconsistency arises due to the evaluative nature of disciplinary offences. While this approach is, to some extent, understandable, it also has significant shortcomings. Under the guise of "purging the judiciary of those unfit for office," it risks undermining standards crucial for safeguarding judicial independence.

Thus, for countries classified as "young democracies," such as Ukraine,[6] it is vital to strike the right balance between holding judges accountable through disciplinary measures and protecting their independence. This delicate balance ensures that judicial accountability does not become a means of exerting undue pressure on the judiciary, thereby preserving both the integrity of the legal system and public trust in it.

Undoubtedly, fostering respect for the tenets of independence, democracy, and the separation of powers necessitates a socio-political consensus surrounding these core principles.[7] This understanding aligns with conclusions drawn in European Union jurisprudence. For instance, the Court of Justice of the European Union, in the case of *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*,[8] established a connection between judges' disciplinary accountability and judicial independence. This ruling enabled the delineation of essential safeguards that disciplinary processes must encompass to uphold the independence principle. Specifically, it mandates procedures before an impartial entity

5 Code of Judicial Ethics (2013) 3 Bulletin of the Supreme Court of Ukraine 27.

6 Oksana Khotynska-Nor, 'Judicial Transparency: Towards Sustainable Development in Post-Soviet Civil Society' (2022) 5(2) Access to Justice in Eastern Europe 83, doi:10.33327/AJEE-18-5.2-n000212.

7 Piotr Mikuli and Maciej Pach, 'Disciplinary Liability of Judges: The Polish Case' in Piotr Mikuli and Grzegorz Kuca (eds), *Accountability and the Law: Rights, Authority and Transparency of Public Power* (Routledge 2021) ch 5, doi:10.4324/9781003168331-7.

8 Case C-64/16 (n 3).

that honour the rights of defence and the right to appeal, alongside a precise legal delineation of disciplinary infractions and corresponding sanctions. Additionally, pertinent interpretations are reflected in the European Court of Human Rights case law, which will be further elucidated later in this article.

2 EUROPEAN STANDARDS OF PROPER DISCIPLINARY PROCEDURE IN RELATION TO JUDGES

Ukraine is currently undertaking dynamic and comprehensive judicial reforms aimed at enhancing the quality of justice and strengthening judicial protection for the rights and legitimate interests of individuals and legal entities. The effectiveness of judicial proceedings is influenced by several factors, including the composition of the judiciary, judicial independence, a robust legal framework, and the proper implementation of guarantees ensuring that independence. However, there are notable shortcomings within the mechanism for terminating a judge's status, particularly through disciplinary proceedings, which in turn negatively impacts judicial independence in Ukraine.

International standards have repeatedly underscored that one of the key safeguards for ensuring judicial independence and irremovability is the existence of a distinct and specialised process for dismissing judges, especially in the context of disciplinary actions. The ***Basic Principles on the Independence of the Judiciary***, adopted by the United Nations General Assembly through Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985,[9] state that judges should only be dismissed for failing to fulfil their duties or for conduct unbecoming of their role. Adherence to these principles ensures that the dismissal mechanism cannot be misused as a tool of pressure or undue influence over the judiciary.

Only under these conditions can we guarantee that the judicial dismissal process remains fair and not a means of compromising judicial independence, which is essential for the rule of law and the integrity of judicial systems.

The Council of Europe Recommendation 2010 (12)[10] underscores the necessity for disciplinary actions against judges to be managed by independent entities or tribunals, thereby ensuring adherence to the guarantees of a fair trial. Furthermore, judges must be afforded the right to appeal any decisions made by the disciplinary authority (para. 69, para. 12).

9 Basic Principles on the Independence of the Judiciary (1985) <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary> accessed 10 September 2024.

10 Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (adopted 17 November 2010) <https://rm.coe.int/16807096c1> accessed 10 September 2024.

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Correspondingly, the European Charter on the Statute for Judges[11] outlines that disciplinary proceedings may be initiated by a competent authority, with sanctions imposed only upon the proposal, recommendation, or endorsement of a court or body comprising at least half elected judges. These proceedings must include a comprehensive hearing where the judge subject to the proceedings has the right to legal representation.

When considering various models for judges' disciplinary accountability, it is evident that certain types of disciplinary tribunals, often situated within general courts—such as those in Germany and Austria—are typically authorised to adjudicate such matters. Alternatively, the responsibilities may be assigned to higher councils of judges or their internal mechanisms. The council-based model is particularly appealing due to its diverse composition, potentially allowing lay members—individuals not directly associated with the judiciary—to participate in evaluating a judge's disciplinary misconduct, which might culminate in their dismissal. Moreover, judicial accountability may encompass various complaint procedures directed at judges. In this context, specialised offices associated with the judiciary (as seen in England and Wales) or ombudsmen (in Sweden and Finland) may fulfil a significant role.[12]

It is important to highlight that, in the case law of the European Court of Human Rights (ECtHR), judges are considered public officials in the broad sense, as they serve the public and, moreover, carry out specific functions on behalf of the state. The ECtHR generally respects the broad discretion of political authorities in personnel management matters. However, the unique status of judges lies not only in the fact that they represent state authority (and thus, to a certain extent, political power) but also in their role as apolitical and independent public servants.

A balance must be struck regarding which aspect of state power dominates the judiciary, particularly when it comes to issues such as the dismissal or career progression of judges. This raises the question of whether such matters should be classified under public or civil law. While performing state functions, the judiciary requires protection from undue political influence to ensure impartiality and independence.

According to the ECtHR's established jurisprudence, disciplinary proceedings related to a judge's right to continue exercising their profession are regarded as "disputes" concerning "civil rights" and, therefore, must be subject to judicial review.[13] This means that any disciplinary process which might result in a judge's dismissal falls under the

11 European Charter on the Statute for Judges and Explanatory Memorandum (1998) <https://rm.coe.int/090000168092934f> accessed 10 September 2024.

12 Mikuli and Pach (n 7).

13 *Pitkevich v Russia* App no 47936/99 (ECtHR, 8 February 2001) <https://hudoc.echr.coe.int/eng?i=001-5726> accessed 10 September 2024; *Harabin v Slovakia* App no 62584/00 (ECtHR, 9 July 2002) <https://hudoc.echr.coe.int/eng?i=001-24031> accessed 10 September 2024; *Vilho Eskelinen and Others v Finland* App 63235/00 (ECtHR, 19 April 2007) <https://hudoc.echr.coe.int/eng?i=001-80249> accessed 10 September 2024.

guarantees provided by Art. 6 of the European Convention on Human Rights (ECHR),[14] which protects the right to a fair trial. This principle was notably emphasised in the case of *Baka v. Hungary* (paras. 104-105), where the Court reiterated that such proceedings must be subject to the safeguards enshrined in the Convention to prevent any misuse of power and to uphold the integrity of the judiciary.[15]

The European Court of Human Rights (ECtHR) does not assert that the responsibility for addressing the disciplinary accountability of judges should rest solely with judicial bodies. It has consistently maintained that designating a professional disciplinary authority—rather than a court—to adjudicate misconduct claims and impose suitable penalties is not inherently incompatible with the stipulations of Art. 6(1) of the European Convention on Human Rights (ECHR). However, if member states of the Council of Europe adopt this model, the disciplinary entity must either fulfil the criteria of Art. 6(1) ECHR, meaning it must be an "independent and impartial tribunal established by law" (para. 67), or its decisions should be amenable to "adequate" judicial oversight by an independent and impartial body (para. 65).[16] Thus, two key factors are considered in evaluating the adequacy of this review: the breadth of the appeal and whether the competent court adheres to the standards of independence.

In the context of Ukrainian law, compliance with these standards is questionable, particularly regarding the role of the High Council of Justice (HCJ) in adjudicating a judge's dismissal as stipulated in Art. 126(3) of the Ukrainian Constitution. Here, the HCJ functions as a quasi-judicial entity that reviews decisions made by the disciplinary authority, known as the Disciplinary Chamber. Notably, the HCJ is not a disciplinary body itself (under Art. 131 of the Constitution); rather, it a) establishes such bodies and b) retains the authority to impose additional disciplinary measures during the dismissal process. The constitutional powers of the HCJ have been broadened under the Law of Ukraine "On the High Council of Justice, "[17] a move some consider permissible based on para. 9 of Art. 131, which states that the HCJ "shall exercise other powers established by the Constitution and laws of Ukraine." However, we contend that legislation should delineate the processes for exercising public authority functions rather than expanding them.

Another critical standard outlined by the ECtHR is that the entity reviewing disciplinary decisions must possess either full judicial authority or a sufficiently comprehensive review scope to evaluate the disciplinary findings. This standard was articulated in the

14 Council of Europe, *European Convention on Human Rights* (Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols) (ECHR 2013) <https://www.echr.coe.int/documents/d/echr/convention_eng> accessed 10 September 2024.

15 *Baka v Hungary* (n 2).

16 *Denisov v Ukraine* App no 76639/11 (ECtHR, 25 September 2018) <https://hudoc.echr.coe.int/eng?i=001-186216> accessed 10 September 2024.

17 Law of Ukraine no 1798-VIII of 21 December 2016 'On the High Council of Justice' (amended 15 April 2024) <https://zakon.rada.gov.ua/laws/show/1798-19#Text> accessed 10 September 2024.

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case of Ramos Nunes de Carvalho, where the ECtHR underscored that a judicial body lacks full jurisdiction if it cannot assess whether the imposed sanction is proportional to the alleged misconduct (para. 202). In determining the adequacy of judicial review, the ECtHR highlighted three essential elements: (1) the subjects encompassed by the review conducted by the relevant national court; (2) the methodology employed by the national court in its review of the disciplinary body's decision regarding the right to a hearing; and (3) the powers of the competent court to finalise the proceedings and provide justifications for its decisions.[18]

We believe the conformity of a judge's dismissal after disciplinary proceedings with European standards is also questionable for several reasons. The legislation establishes the Disciplinary Chambers as the exclusive disciplinary authority regarding judges, while the High Council of Justice effectively acts as an appellate body, reviewing disciplinary cases with the authority to independently alter the sanctions imposed. In this context, the powers of the HCJ fulfil the criteria for "full jurisdiction." Thus, the national legislature has effectively created both a "disciplinary court" and a "disciplinary appellate court" within a single institution.

In this context, there is a risk of violating the standard of due process of law, such as "one court - one instance", and secondly, the standard of "court established by law". The Constitution of Ukraine assigns the High Council of Justice the function of "consideration of complaints against decisions of the disciplinary body" (Art. 131(1)(3)) and provides that "disciplinary bodies shall be established in the system of justice in accordance with the Law" (Art. 130(10)). However, the HCJ itself, according to the Law, is classified as a judicial governance body (Art. 1 of the Law of Ukraine "On the High Council of Justice").

A systematic analysis of the legislation on the judiciary reveals the existence of institutions with three different statuses of judicial governance, judicial self-government, and judicial body, all operating within the system of judicial support bodies. The lack of terminological uniformity in national legislation raises the question of whether the Law of Ukraine "On the High Council of Justice" complies with the Constitution of Ukraine in terms of empowering the HCJ to create within its structure bodies composed of its members, which are constitutionally empowered to consider complaints against decisions made by the same disciplinary bodies.

At the same time, both the number of disciplinary chambers and their composition are determined by the HCJ by its own decision, which is not a legislative act in its own right. In addition, although the Law of Ukraine "On the High Council of Justice" names the disciplinary chambers as the sole authority in relation to judges (pt. 1 of Art. 42), the HCJ

18 Lorena Bachmaier Winter, 'Disciplinary Sanctions against Judges: Punitive but not Criminal for the Strasbourg Court Pragmatism or another Twist towards Further Confusion in Applying the Engel Criteria?' (2022) 4 EUCRIM The European Criminal Law Associations' Forum 260.

may independently decide to change the disciplinary sanction when considering an appeal against a decision of a disciplinary body.

Moreover, the legislature has restricted a judge's access to the traditional judicial system, limiting their ability to protect their "civil right" to continue professional activities. The law outlines narrow and formal grounds for appealing the High Council of Justice's dismissal decision: 1) if the Council's composition lacked the necessary authority to make the decision; 2) if any participating Council member did not sign the decision; and 3) if the decision fails to specify the legal grounds for the judge's dismissal and the rationale behind the Council's conclusions.[19]

Moreover, it is the Law of Ukraine, "On the High Council of Justice," rather than the Code of Administrative Procedure, that outlines the grounds upon which a court may overturn a decision to dismiss a judge. This distinction means that judicial review of dismissal decisions is somewhat restricted. Such limited judicial oversight may be interpreted by the European Court of Human Rights (ECtHR) as a limitation on access to justice, potentially infringing on the right of dismissed judges to effectively protect their rights and interests.

At the same time, the Code of Administrative Procedure of Ukraine does not restrict the right of a judge to file a complaint against an HCJ decision. The analysis of the case law of the Administrative Court of Cassation of the Supreme Court shows that the rules of procedural law guide judges in these disputes and do not respond in court. However, this does not preclude the provision of Art. 52 of the Law "On the High Council of Justice" in terms of attempts to restrict access to court does not contradict Art. 6 of the ECHR and the case law of the ECtHR.

The ECtHR has repeatedly emphasised the importance of judicial review as a safeguard against arbitrary or politically motivated decisions. By limiting the scope of court involvement in reviewing dismissals, there is a risk of violating Art. 6 of the European Convention on Human Rights (ECHR), which guarantees the right to a fair hearing. From this perspective, the ECtHR could view the constrained judicial review process as an impediment to the dismissed judges' ability to seek redress, thus undermining the judicial independence that these protections are designed to uphold. Therefore, ensuring broader judicial review of dismissal decisions is crucial for safeguarding both judicial independence and the rights of judges to a fair and impartial legal process.

It is important to highlight that Art. 55 of the Ukrainian Constitution enshrines the fundamental right to judicial protection against unlawful actions, decisions, or omissions by authorities. It states, "Everyone shall be guaranteed the right to appeal to a court against decisions, acts, or omissions of state authorities, local self-government bodies, officials, and civil servants." The Constitutional Court of Ukraine's Decision No. 19-rp/2011, dated

19 Maryna O Materynko, 'Organisational and Legal Bases of Dismissal of a Judge from Office' (PhD (Law) thesis, Yaroslav Mudryi Ukrainian National Academy of Law 2021) 14.

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14 December 2011,[20] interprets pt. 2 of Art. 55, asserting that human rights and their guarantees shape the content and direction of state activity (pt. 2 of Art. 3 of the Constitution).

State authorities and local self-government bodies, along with their officials, are endowed with public authority, enabling them to make decisions and perform actions based on powers defined by the Constitution and laws. Individuals affected by decisions or actions of public authorities are entitled to a defence.

According to Art. 5(1) of the Code of Administrative Procedure of Ukraine,[21] anyone who believes that a decision, action, or inaction by a public authority has infringed upon their rights, freedoms, or legitimate interests has the right to seek protection in an administrative court. Consequently, the right to judicial protection outlined in Art. 55 of the Constitution and further detailed in relevant laws allows individuals to petition the court for redress of violations. However, such violations must be substantiated and directly pertain to the rights or interests of the claimant.[22]

Furthermore, Art. 8 of the Universal Declaration of Human Rights asserts that everyone is entitled to an effective remedy through competent national tribunals for violations of the fundamental rights and freedoms guaranteed by the Constitution or by law.

The European Social Charter[23] enshrines the right of all workers to protection in cases of dismissal, as outlined in Art. 24(2), which mandates that any worker who believes they have been unfairly dismissed must have access to an independent and impartial body for appeal. In situations where the grounds for terminating a public official's employment are subjective and based on evaluative judgments, judicial oversight is crucial to ensure that the procedures for establishing such grounds are properly followed. This is essential to prevent any abuse of authority in the dismissal of judges by competent bodies. Therefore, we assert that dismissals based on para. 3 of pt. 6 of Art. 126 should be fully subject to judicial review without restrictions on judicial jurisdiction.

In this regard, it is useful to refer to the European Court of Human Rights' (ECtHR) decision in the case of *Oleksandr Volkov v. Ukraine*.[24] In that case, the Court reached a clear conclusion: the procedure for dismissing a judge must be safeguarded by "judicial guarantees," including independence, impartiality, transparency, competitiveness, the

20 Decision of the Constitutional Court of Ukraine of 14 December 2011, No. 19-rp/2011. URL: https://zakon.rada.gov.ua/laws/show/v019p710-11#Text.

21 Code of Administrative Procedure of Ukraine no 2747-IV of 6 July 2005 (adopted 15 November 2024) <https://zakon.rada.gov.ua/laws/show/2747-15#Text> accessed 10 September 2024.

22 Oksana Khotynska-Nor and Lidiia Moskvych, 'Limits of a Judge's Freedom of Expressing His/Her Own Opinion: The Ukrainian Context and ECtHR Practice' (2021) 4(3) Access to Justice in Eastern Europe 170, doi:10.33327/AJEE-18-4.3-n000077.

23 European Social Charter (2016) <https://edoc.coe.int/en/european-social-charter/7256-european-social-charter.html > accessed 10 September 2024.

24 *Oleksandr Volkov v Ukraine* App no 21722/11 (ECtHR, 9 January 2013) <https://hudoc.echr.coe.int/eng?i=001-115871> accessed 10 September 2024.

right to a defence, and the reasonableness of the duration of proceedings. The Court emphasised that all these procedural elements are necessary to ensure fairness and protect judicial independence.

However, the case of *Stanislav Shevchuk*, the former Chairman of the Constitutional Court of Ukraine, serves as a notable counterexample. Shevchuk was dismissed by the Constitutional Court, and when he attempted to appeal the decision, the Administrative Court of Cassation refused to hear the case. The dismissal was based on Art. 151-2 of the Constitution of Ukraine, which states that "Decisions and conclusions of the Constitutional Court of Ukraine shall be binding, final, and not subject to appeal." This situation raises concerns about the absence of judicial review in certain high-profile judicial dismissals, highlighting the potential for conflict between constitutional provisions and the broader principles of judicial oversight.

Thus, ensuring that all dismissal decisions, particularly those involving judges, are subject to comprehensive judicial scrutiny is critical to maintaining the balance between accountability and judicial independence. Without such oversight, there is a risk of undermining the very principles of fairness and justice that judicial systems are meant to uphold.[25]

In our view, restricting the right to judicial protection is only justifiable when the dismissal process adheres to the principles of due (fair) procedure. This includes ensuring impartiality, transparency, competitiveness, and other safeguards. However, the dismissal process of Judge Stanislav Shevchuk clearly did not meet these requirements. For instance, the fact that the judges who voted on his dismissal were the same individuals who had previously investigated his alleged disciplinary offence raises serious concerns regarding impartiality and fairness. Their prior involvement in the case that initiated the dismissal process compromised the neutrality of the proceedings, making it impossible to assert that the decision in Shevchuk's case was fair or impartial.

Additionally, the Administrative Court denied Judge Shevchuk's access to a proper and fair legal procedure to defend his right to work. This failure to provide due process undermines the core principles of fairness and judicial integrity. Unfortunately, this issue extends beyond Shevchuk's case; the dismissal procedures carried out by the High Council of Justice in disciplinary cases generally do not meet the standards of due (fair) process, as outlined in Art. 6(1) of the European Convention on Human Rights (ECHR).

Drawing on the jurisprudence of the European Court of Human Rights (ECtHR), Ukrainian courts are beginning to develop criteria for the "admissibility" of disputes over judges' labour rights, particularly in cases of dismissal. In this context, the Grand Chamber of the Supreme Court has referred to the legal position expressed by the ECtHR in the case of *Oleksandr Volkov v. Ukraine*. In this landmark case, the ECtHR held that even if the first-instance

25 Constitution of Ukraine (n 4).

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judicial body fails to fully comply with the requirements of Art. 6(1) of the ECHR, there is no violation if the decision is subject to review by a higher judicial body with full jurisdiction that can provide the necessary safeguards under Art. 6(1).

The Grand Chamber of the Supreme Court cited ECtHR jurisprudence in several cases, including *Albert and Le Compte v. Belgium* (1983) and *Tzfayo v. the United Kingdom* (2006), to emphasise that a higher court must be able to conduct a comprehensive review of the decision-making process. This review must account for factors such as the subject matter, the manner in which the decision was made, and the grounds for appeal, as detailed in *Bryan v. the United Kingdom* (1995).[26]

The failure of Ukraine's current dismissal mechanism for judges, especially in the context of disciplinary proceedings, demonstrates that it does not fully align with European standards. Specifically, the lack of impartiality, limited judicial oversight, and restricted access to fair procedures weaken the overall integrity of the judiciary and undermine the protection of judges' labour rights. This discrepancy highlights the need for reform in line with European legal principles to ensure that disciplinary dismissals of judges are subject to sufficient legal safeguards and comprehensive judicial review.

The first step should be to change the wording of pt. 1 of Art. 52 of the Law of Ukraine "On the High Council of Justice" to explicitly define the exclusive grounds for appealing against an HCJ decision issued during the review of a disciplinary body's decision, specifically in terms of imposing a disciplinary sanction in the form of a motion to dismiss a judge from office.

In addition, a more strategic task for the Ukrainian authorities should be to separate three functions: disciplinary body, judicial (appellate) control and decision-making on the dismissal of a judge on the merits. The wording of the current Law of Ukraine, "On the High Council of Justice," consolidates all three functions in the powers of a single body, creating potential conflicts of interest and undermining procedural clarity.

Ideally, we would see this formula: The High Council of Justice, by analogy with its powers to form the composition of the High Qualification Commission of Judges, creates a Disciplinary Body that operates separately from the HCJ. The decisions of this body would then be subject to full judicial (procedural) control. Meanwhile, the HCJ would retain administrative control and be limited to making decisions on the dismissal of a judge on the merits.

However, implementing such a model would require changes to the existing judicial legislation and additional financial support. However, such a model would align more closely with the requirements of the Constitution of Ukraine (Art. 130(10)) and European standards, enhancing transparency, accountability, and compliance with the rule of law.

26 Case proceedings no 11-490sap19 (Grand Chamber of the Supreme Court of Ukraine, 14 November 2019) <https://reyestr.court.gov.ua/Review/86275965> accessed 10 September 2024.

3 STANDARDS OF PROVING A JUDGE'S GUILT IN DISCIPLINARY PROCEEDINGS

Decisions in disciplinary cases should be based on evidence of the judge's guilt in the disciplinary offence. However, the regime for establishing guilt and evaluating evidence significantly affects the guarantees of a judge's rights in disciplinary proceedings.

As shown above, modern judicial European standards of disciplinary proceedings have significantly reduced the level of protection of judicial independence in disciplinary proceedings precisely because of the qualification of judges' rights as "civil". However, it is worth recalling that the ECHR has long considered disciplinary sanctions against judges as criminal in nature and, therefore, recognised the need to extend criminal procedural guarantees (which are inherently broad) to disciplinary proceedings against judges. The logic was simple: by committing a disciplinary offence incompatible with the position of a judge, a person committed a criminal offence, as he or she damaged the reputation and authority of the state authorities. Accordingly, dismissal as a disciplinary sanction is a punishment which is an institution of criminal law.

That is, the ECtHR has long applied the Engel criteria[27] to disciplinary proceedings in which there is a potential possibility of dismissal of a judge precisely to extend criminal procedural guarantees. These included adjudication exclusively by a court, with the mandatory participation of a lawyer, a guarantee not to incriminate oneself, etc.[28] However, by introducing a standard for qualifying the rights of a dismissed judge as "civil" and abandoning Engel's criteria for assessing certain disciplinary proceedings as "quasi-criminal in nature," the ECtHR has formed an approach to the possibility of bringing this category of proceedings into the regime of alternative proceedings and the admissibility of quasi-judicial institutions.

While this approach has created a new challenge, it has also allowed for the possibility of reducing procedural guarantees for the protection of judges' rights, which has become a real threat to the guarantees of irremovability and judicial independence.[29]

In fact, it is the idea of "qualification" of the nature of a disciplinary offence that underlies the divergence of approaches to this issue in the practice of the ECtHR and the EU Court of Justice. The latter, in its judgment in *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas* 7 CJEU, linked the disciplinary liability of judges to the independence of the judiciary as defined in Art. 19(1) of the Treaty on the European Union and thus expanded

27 *Engel and Others v The Netherlands (Article 50)* App nos 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (ECtHR, 23 November 1976) <https://hudoc.echr.coe.int/eng?i=001-57478> accessed 10 September 2024.

28 Tetiana Baranovska and other, 'Theoretical and Practical Dimensions of Legal Responsibility in Criminal Justice' (2024) 6 Multidisciplinary Science Journal e2024ss0737, doi:10.31893/multiscience.2024ss0737.

29 Bachmaier Winter (n 18).

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the EU's competence to address these issues by broadly interpreting Art. 51(1) of the Charter of Fundamental Rights of the European Union. This allowed the Court of Justice to rule on the guarantees of independence of the judiciary in the Member States and led to the definition of certain guarantees that disciplinary proceedings should include respecting the said principle of independence. Thus, when it comes to the independence of the judiciary and its effective protection, the EU Court of Justice has expanded the traditional limitations set by substantive criteria that define the scope of EU and national law and formed its well-established case law on guarantees of judicial independence in Member States,[30] including enhanced guarantees of protection of judges from prosecution by disciplinary authorities,[31] in particular, in terms of the standard of proof of guilt in a disciplinary offence.

Unfortunately, Ukrainian legislation has adopted the approach of the ECtHR in this matter and has enshrined the standard of proof of "sufficient probability" (pt. 16 of Art. 49 of the Law of Ukraine "On the High Council of Justice"), which is typical for civil proceedings. The procedure of proof itself provides for the obligation to prove guilt or innocence of a disciplinary offence to be imposed on both the HCJ disciplinary inspector and the judge subject to disciplinary proceedings. At the same time, the standard of "sufficient probability" will not require the disciplinary body to fully analyse the arguments provided by the parties to the proceedings, but only "sufficient reasons" to understand the reasons for the decision.[32]

At the same time, it should be noted that the ECtHR also expresses the position that "the nature and severity of punishments may affect the procedural guarantees provided for in Art. 6 of the European Convention on Human Rights".[33] In this regard, the Grand Chamber of the Supreme Court, "taking into account the public law nature of the disciplinary liability of a judge', pointed out the need to use the standard of proof 'beyond reasonable doubt" in disciplinary proceedings, which will exclude any doubt about the guilt of a judge in a disciplinary offence that precludes the possibility of continuing his or her professional activity.[34]

30 Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the System of Justice)* (CJEU, 25 July 2018) <https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-216/18%20PPU> accessed 10 September 2024; Case C-83/19 *Asociația "Forumul Judecătorilor din România"* (CJEU, 18 May 2021) <https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-83/19&jur=C> accessed 10 September 2024; Case C-430/21 - RS *(Effet des arrêts d'une cour constitutionnelle)* (CJEU, 22 February 2022) <https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-430/21&jur=C> accessed 10 September 2024.

31 Mikuli and Pach (n 7).

32 *Salov v Ukraine* App no 65518/01 (ECtHR, 6 September 2005) <https://hudoc.echr.coe.int/eng?i=001-70096> accessed 10 September 2024.

33 Oksana Kaplina and Anush Tumanyants, 'ECtHR Decisions that Influenced the Criminal Procedure of Ukraine' (2021) 4(1) Access to Justice in Eastern Europe 102, doi:10.33327/AJEE-18-4.1-a000048.

34 Case no 9901/855/18 (Supreme Court of Ukraine, 8 October 2019) <https://reyestr.court.gov.ua/Review/84900516> accessed 10 September 2024.

However, the national disciplinary body (Disciplinary Chambers of the High Council of Justice) in its decisions refers to the standard of proof "beyond reasonable doubt",[35] on the "sufficiency of the evidence,"[36] substantiating that the "beyond reasonable doubt" standard is admissible only in criminal proceedings. This view aligns with the ECHR judgement in *Ringvold v. Norway*,[37] where it was determined that disciplinary proceedings against judges are not criminal in nature. The lack of uniformity in the national judicial and disciplinary system is likely due to the absence of a clear regulatory framework on this issue, which was only implemented in 2023.

However, we do not share the fairness of the approach chosen by the legislator regarding the standard of proof of a judge's guilt, which may result in his or her dismissal. In our opinion, the emphasis should not be on the gravity of the offence but on the need for increased guarantees in proving the judge's guilt in actions incompatible with the position held, i.e., we should be talking about increasing the guarantee of irremovability of a judge from office. In particular, this approach was also pointed out by the ECtHR in the case of *Oleksandr Volkov v. Ukraine*, where the court emphasised the importance of assessing the consequences of disciplinary sanctions for a judge's career (paras. 93-95).[38] That is why we support the position to change the wording of pt. 16 of Art. 49 of the Law of Ukraine "On the High Council of Justice" and to require that the decision of the disciplinary body be based on evidence that will eliminate any doubt about the judge's guilt in committing an offence incompatible with the judge's further stay in office.

In our opinion, judges, as holders of state power who enjoy the highest guarantees of independence and immutability, need increased protection in the procedures for bringing them to justice, including disciplinary proceedings, especially regarding the possibility of dismissal. In its judgments, the ECtHR has repeatedly emphasised that the choice of the standard of proof in cases should be influenced by the "seriousness of the consequences associated with the possible decision" (para. 481).[39] The procedure for proving the guilt of a judge should be based on respect for the independence of a judge and guarantees of irremovability from office. Given the introduction in Ukraine of the institution of a disciplinary inspector as a public official authorised to formulate "charges" against a judge for committing a disciplinary offence (i.e. the burden of proof

35 Decision no 1726/2dp/15-21 (High Council of Justice, 2 August 2021) <https://hcj.gov.ua/doc/doc/487> accessed 10 September 2024.

36 Andriy Khymchuk, 'Standards of Proof in Disciplinary Proceedings against Lawyers: What are They and What Should They Be?' (*Democracy, Justice, Reforms*, September 2021) <https://dejure.foundation/standarty-dokazuvannia/> accessed 10 September 2024.

37 *Ringvold v Norway* App no 34964/97 (ECtHR, 11 February 2003) <https://hudoc.echr.coe.int/eng?i=001-60933> accessed 10 September 2024.

38 *Oleksandr Volkov v Ukraine* (n 24).

39 *Abu Zubaydah v Lithuania* App no 46454/11 (ECtHR, 31 May 2018) <https://hudoc.echr.coe.int/eng?i=001-183687> accessed 10 September 2024.

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is shifted from the individual complainant to the public official), it is likely that the disciplinary procedure will acquire the features of a public process.

Since disciplinary proceedings against judges involve determining the guilt of a public official and may result in his or her dismissal, the introduction of the "beyond reasonable doubt" standard of proof in the disciplinary procedure should be a tool to balance the guarantees of judicial independence with the official nature of the proceedings.

We believe that until the updated procedure of disciplinary proceedings involving disciplinary inspectors becomes operational in Ukraine, the legislator should reconsider its approach to determining the acceptable standards of proof. In particular, we suggest a diversionary approach, whereby the strictest standard of proof is applied only in cases where the decision concerns the submission of a motion to dismiss a judge from office.

4 CONCLUSIONS

Establishing a special procedure for the dismissal of judges, characterised by exceptional grounds and unique processes, constitutes a fundamental aspect of their legal status. A key condition for implementing this specialised procedure is the assurance of judges' irremovability. The design of the dismissal procedure falls within the realm of state discretion. It serves as a reflection of the extent to which the principle of judicial independence is safeguarded for those who hold this position.

However, the disciplinary procedure to remove a judge from their official capacity as a civil servant introduces potential risks that may undermine their independence. Conversely, state authorities and their officials need to have sufficient oversight mechanisms in place to ensure the legality of their actions, thereby preventing any abuse or misuse of power. Consequently, the disciplinary process for removing a judge should strike a reasonable balance between upholding guarantees of irremovability and independence and providing fair oversight of the legality of judicial actions.

A primary requirement for conducting disciplinary proceedings against judges must be an objective approach to assessing misconduct allegations. Additionally, it is crucial to ensure impartiality and eliminate any discretionary interpretations regarding a judge's behaviour so that the framework of disciplinary accountability does not evolve into a tool that compromises judicial independence.

Disciplinary actions that could jeopardise a judge's career and infringe upon the constitutional guarantee of their irremovability—specifically the imposition of a dismissal sanction—should adhere to the highest standards of protection and evidentiary requirements, similar to those applied in criminal proceedings. This includes safeguarding against any unreasonable limitations on the right to appeal decisions made by disciplinary bodies.

Thus, decisions regarding the dismissal of a judge based on pt. 6, para. 3 of Art. 126 of the Constitution of Ukraine—related to committing serious disciplinary violations, gross or systematic neglect of duties inconsistent with judicial status, or demonstrating incompatibility with the role—must be subject to comprehensive judicial oversight. The jurisdiction of the courts should not be curtailed in these instances.

In cases where disciplinary proceedings serve a preventive function and do not pose a significant risk to the guarantee of a judge's irremovability—such as sanctions that do not involve removal from office—applying the guarantees and standards of proof typically used in civil law proceedings is permissible, primarily for reasons of procedural efficiency.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Оглядова стаття

ПРОЦЕДУРА ЗВІЛЬНЕННЯ СУДДІ В ДИСЦИПЛІНАРНОМУ ПОРЯДКУ ТА СИСТЕМА ГАРАНТІЙ ЙОГО/ЇЇ НЕЗАЛЕЖНОСТІ: СТАНДАРТИ ЄВРОПЕЙСЬКОЇ СУДОВОЇ ПРАКТИКИ ТА ПРАВОВЕ РЕГУЛЮВАННЯ В УКРАЇНІ

Лідія Москвич*, Ірина Бородіна, Ольга Овсяннікова та Олександр Дудченко

АНОТАЦІЯ

Вступ. *У статті розглядаються проблеми та прогалини в правовому регулюванні та практиці застосування процедур припинення статусу суддів в Україні внаслідок притягнення до дисциплінарної відповідальності. У дослідженні використовується поєднання загальних та специфічних методів дослідження, заснованих на філософському підході, для розуміння сутності, природи та особливостей національної практики в контексті європейських стандартів судового права. На основі аналізу прецедентного права Європейського суду з прав людини (ЄСПЛ) і Суду Європейського Союзу (СЄС), стаття демонструє, що європейські правові межі встановили комплексні стандарти належної правової процедури в дисциплінарних провадженнях, які призводять до звільнення судді. Проте аналіз української правової системи щодо звільнення суддів виявляє значні невідповідності цим європейським підходам.*

Стверджується, що чинна законодавча база України щодо звільнення суддів після дисциплінарного провадження не сприяє підвищенню прозорості судочинства та не повністю відповідає національній Конституції, стандартам Європейського Союзу чи міжнародним правовим нормам. Враховуючи прагнення України щодо подальшої інтеграції до Європейського Союзу, у статті наголошується на важливості впровадження найкращих практик та реформування законодавчої бази, яка регулює звільнення суддів через дисциплінарні проступки, які роблять суддів неспроможними залишатися на посаді.

Методи. *Автори використовували низку наукових методів дослідження, зокрема діалектичне міркування, спостереження, синтез, аналогію, а також індуктивний і дедуктивний аналіз. За допомогою формальних та формально-юридичних методів було окреслено структуру, завдання та характер процедури звільнення суддів. Метод системного аналізу було застосовано для пошуку та перегляду відповідної прецедентної практики, особливо ЄСПЛ та Суду ЄС. Висновки дослідження зроблені на основі емпіричного матеріалу, що забезпечує комплексне розуміння як теоретичних, так і практичних аспектів.*

Результати та висновки. *Результати дослідження містять науково обґрунтовані пропозиції щодо вдосконалення законодавчої бази, яка регулює питання звільнення суддів у зв'язку з притягненням до дисциплінарної відповідальності. Ці пропозиції розроблено відповідно до правових підходів Європейського суду з прав людини та Суду Європейського*

Союзу, зокрема щодо захисту прав суддів як державних службовців та забезпечення гарантій незалежності судової влади.

Практичне значення дослідження відображено в конкретних рекомендаціях, спрямованих на оптимізацію процесу звільнення суддів з посад, з'ясування законних цілей таких змін та вдосконалення діяльності Вищої ради правосуддя щодо оцінки підстав і порядку звільнення суддів за дисциплінарні проступки. Ключовою рекомендацією є запровадження стандарту доказування «поза розумним сумнівом» у дисциплінарних провадженнях проти суддів, зокрема у випадках, коли розглядається питання про їх звільнення. Цей вищий стандарт доказування зміцнить незалежність судів та забезпечить звільнення, яке ґрунтуватиметься на надійних, аргументованих доказах, а не буде результатом свавільних чи політично вмотивованих рішень.

У статті наголошується на важливості цих реформ для правової системи України не лише для приведення у відповідність із європейськими правовими стандартами, а й для підвищення прозорості, справедливості та незалежності судової системи в Україні.

Ключові слова: *суддя, звільнення судді, дисциплінарний проступок, гарантії незалежності суддів, судова практика, стандарт доказування в дисциплінарних справах.*