

Ways towards Justice

IMPLEMENTING THE PRINCIPLE OF THE DIVISION OF POWER

IS THE JUDICIARY INDEPENDENT (III)

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Conscientious work and conduct of the judges are the necessary conditions for successfully performing a judge's function and for establishing the confidence of the public in their work. It is exactly for this reason that it is particularly important to sanction any form of negligent work and conduct of judges. We practically do not have a system of disciplinary responsibility of judges and it should yet be established in accordance with international standards.

Apart from dismissal of the function of a judge, the actual Constitution does not know any other form of judges' responsibility for negligent performing of their function or a conduct unworthy of the function of a judge.

However, between a conduct worthy of a judge and a conscientious performing of the function of a judge, and an unworthy conduct and a negligent work which deserves dismissal, there is a wide variety of acts which deserve some sort of sanction. In the majority of the countries this is realized through disciplinary responsibility of the judge.

As any form of "punishment" or "bringing a judge to discipline" bears the danger of influencing the judge's independence, the issue of disciplinary responsibility of judges was a subject under consideration of numerous international conventions and suggestions. Established were international standards which were perhaps most clearly defined by the Consultative Council of European Judges to the Council of Europe in its Opinion No. 3 (2002): "1. in each country the statute or fundamental charter applicable to judges should define... the failings that may give rise to disciplinary sanctions as well as the procedures to be followed; 2. as regards 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; 3. any disciplinary proceedings initiated should be determined by an independent authority or tribunal, operating a procedure guaranteeing full rights of defense; 4. 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)...; 5. 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; 6. 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."

Up to the entering into force of the "set of judicial laws" (January 1, 2002) our law did not know any other form of responsibility of judges apart from dismissal from judgeship. Although in the Act on Judges there are also no specific provisions on disciplinary responsibility of the judge, this law deals with situations in which it is possible to pronounce certain measures against judges, which by their character are disciplinary sanctions. Thus the High Personnel Council in the process of deciding on the incompatibility of a function or engagement with judgeship, can give the judge a warning. It is allowed to appeal upon this decision to the High Judicial Council. Besides, in the process for dismissal the High Personnel Council can also, due to negligent or unprofessional performance, issue a warning to the judge, or remove the judge from the court for a period ranging from one month to one year. The judge has the right of appeal in regard to this measure to the General Session of the Supreme Court.

The system of responsibility of judges that is established in this manner has a number of fallacies which do not secure its efficiency and fairness. Here we shall point at two most important ones. The first one is that it is possible to pronounce such a sanction only within a dismissal procedure or within a process in which it is decided whether or not the functions and duties are incompatible with judgeship. Hence, it is not possible to initiate a procedure only for pronouncing a disciplinary measure. This is the consequence of the fact that the rules did not define the failings which can lead to disciplinary sanctions (disciplinary misdemeanor). In practice the result is that certain failings of judges, which are not of such a character as to demand initiating procedures for dismissal, remain unsanctioned. The second fallacy is that no

mechanisms are established to guarantee balance between the failing and the sanction that can be pronounced. So, it is possible that for the same failings the judges get either different disciplinary sanctions or that they be proposed for dismissal.

This short analysis does clearly indicate that we (although there is a possibility of pronouncing disciplinary sanctions) practically have no system of disciplinary responsibility of judges and that it is yet to be established in accordance with international standards.