Abstract. Using specific examples (in particular from the practice of the Grand Chamber of the Supreme Court), the research analyzes and describes which offenses by a judge are classified under subclause “b” of clause 1 of Article 106 of the Law of Ukraine On the Judiciary and the Status of Judges (omission to include the reasons for accepting or rejecting the arguments of the parties on the merits of the dispute into the court decision).

Research papers have been reviewed and information regarding the development and current state of this issue has been provided.

Controversial issues regarding application of this ground for disciplinary action have been outlined. The dynamics of its implementation have been traced based on statistical data. Research papers have been reviewed and information regarding the development and current state of this issue have been provided.

Examples of actions by judges classified as failure to include the reasons for accepting or rejecting the arguments of the parties on the merits of the dispute into the court decision have been outlined.

According to authors, different practices of the High Council of Justice and its chambers concerning application of subclause “b” of Article 106 of the Law of Ukraine On the Judiciary and the Status of Judges have resulted from not only varying interpretations of the merits of the dispute term but also from various ideas among legal professionals as to correlation between subclause “b” of clause 1 and clause 4 of Article 106 of the Law of Ukraine On the Judiciary and the Status of Judges. Because the failure to indicate reasons for accepting or rejecting the parties’ arguments in the court decision is inherently a violation of the right to a fair trial, the responsibility for such violations is envisaged under clause 4 of Article 106 of the Law of Ukraine On the Judiciary and the Status of Judges.

It is stated that in order to restore trust in the judicial authority, it is necessary to review and adjust the procedure for taking disciplinary measures against judges. The authors point out that in order to make qualitative changes to the institute of grounds for the disciplinary action against judges, it is not enough to simply compare texts of such grounds under the legislation of Ukraine and European countries. It’s necessary to study and compare disciplinary practices in both Ukraine and countries with developed legal systems in Europe, focusing on what specific behaviors result in disciplinary action against judges in these jurisdictions. While performing such research, it is vital to keep in mind that disciplinary action against judges cannot be studied separately from other types of legal liability (criminal, administrative, civil).

Research Problem Formulation. There are legislatively defined grounds for taking disciplinary measures against judges, however, a number of issues arise that require clarification, detailing, and specific practical resolution. Such pressing issues include:

- criteria for the reasoning of a court decision, in our opinion, is a key issue;
- distinction between evaluation of court decisions and evaluation of judges’ actions while its adoption;
- ambiguity between verification of court decision content and verification of how judges perform their official duties;
- the authority of the Higher Council of Justice regarding whether it has the right to analyze a court decision, and if it does not, an explanation is needed as to why its decisions often include extensive quotations from court decisions;
- the possibility of applying subclause “b” of clause 1 of Article 106 of the Law of Ukraine On the Judiciary and the Status of Judges without evaluating court decision and determining where is a line between judicial evaluation and evaluation provided by the disciplinary authority;
- the obligation or right of the disciplinary authority to take into account court decisions (in particular, decisions of higher courts on the merits of a case) when adopting its own decisions;
- subjecting a judge to disciplinary liability for deviating from approaches prevailing in judicial practice;
- the right of the Higher Council of Justice to identify judicial errors in an ongoing proceeding;
- consideration of cases where the overturning of a court decision may indicate disciplinary breach in the judge’s actions;
- the right of the Higher Council of Justice to assess the correct application of substantive and procedural law norms. Which decisions relate to the merits of the...
Dispute within the meaning of subclause “b” of clause 1 of Article 106 of the Law of Ukraine On the Judiciary and the Status of Judges; application of subclause “b” of clause 1 of Article 106 of the Law of Ukraine On the Judiciary and the Status of Judges to judges for the lack of reasoning in court decisions on the application of measures to ensure a criminal proceeding, measures to secure a claim, renewal of procedural time limits, etc.; correlation between a ground for disciplinary action provided by subclause “b” of clause 1 of Article 106 of the Law of Ukraine On the Judiciary and the Status of Judges, and other grounds, for example, those listed in subclause “b” of clause 1 and clause 4 of the mentioned law (in which cases there is competition, and in which the offense needs to be classified according to the accumulation of disciplinary offenses).

The above issues are just a small list of those generating discussions, some lead to various disciplinary practices, ambiguous resolution of problematic issues, etc.

The main reason for qualifying differently similar violations by judges is a great number of evaluative concepts among the grounds for disciplinary action 1.

The same conclusion has been reached by researchers who analyzed decisions made by the Higher Council of Justice and court decisions adopted between 2019–2020 according to the results of their appeal conducted by the Center for Democracy and Rule of Law Public Organization with the support of USAID within the framework of the New Justice program 2.

Analysis of Essential Researches and Publications. A significant contribution to the study of disciplinary action against judges have been made by S. Rabinovych, T. Pashuk, N. Antoniuk, Zh. Simonyshyna, O. Verba-Sydor, V. Hryschchuk, L. Paliukh, V. Plaksa, A. Miroshnychenko, R. Bondarchuk, A. Boiko, R. Kuiبدا, M. Sereda, M. Khavroniuk, and others. Disciplinary liability problematic has been the subject of several monographs, including those by L. Vynohradova (Legal liability of judges of the courts of general jurisdiction in Ukraine, 2004), S. Podkopaiev (Disciplinary action against judges: essence, mechanism of implementation, 2005), A. Maliaренко (The basis of the legal liability of judges of general jurisdiction of Ukraine, 2013), V. Paryshkura (Legal liability of judges in Ukraine and the European Union countries: comparative legal analysis, 2017), R. Bondarchuk (Administrative and legal regulation of the procedure for bringing a judge to disciplinary responsibility, 2021). However, many issues concerning practical aspects of applying subclause “b” of clause 1 remain controversial.

The Research Paper Purpose is to clearly explain, based on specific examples (including from the practice of the Grand Chamber of the Supreme Court), which violations by a judge are classified under subclause “b” of clause 1 of Article 106 of the Law of Ukraine On the Judiciary and the Status of Judges.

Main Content Presentation. Between 2017 and 2021, according to the register of acts of the Higher Council of Justice, 186 disciplinary proceedings were initiated on the basis of subclause “b” of clause 1, of which 38 cases were opened solely on the basis of subclause “b” of clause 1 3. As stated in Information and Analytical Reports on the Activities of the Higher Council of Justice, under subclause “b” of clause 1 (omission to include the reasons for accepting or rejecting the arguments of the parties on the merits of the

2 Дисциплінарна практика Вищої ради правосуддя і судова практика в дисциплінарних справах стосовно суддів у 2019–2020 роках. Аналітичний звіт з рекомендаціями за результатами моніторингу. URL: https://pravo.org.ua
3 Акти Вищої ради правосуддя. URL: https://hcj.gov.ua/acts

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...

- whether the court decision proves that the parties have been heard by the court;
- whether the court decision is the result of an unbiased examination by the court of comments, arguments, and evidence presented by the parties;
- whether the court decision substantiates the court’s actions in terms of choosing arguments and accepting/rejecting evidence of the parties.

According to the practice of taking disciplinary measures against judges, we can single out the following examples of judges’ actions which were classified as omission to include the reasons for accepting or rejecting the arguments of the parties on the merits of the dispute into the court decision:

1. in the minutes for customs rules violation, there was a reference to inoperative legislation, but the judge ignored these arguments, limiting himself to a general phrase about a person’s disagreement with the minutes; he failed to address the argument that actions charged against the individual were not an offense under Part 1 of Article 483 of the Customs Code of Ukraine, since the essence of an offense outlined in the minutes did not coincide with crime elements (Decision of the Higher Council of Justice No. 2060/0/15-18 dated June 26, 2018);

2. the investigating judge had seized 3003 (three thousand and three) land plots, which were leased by an agricultural company, but did not explain what circumstances of a criminal proceeding necessitated such a measure; did not justify how land plots could be used as evidence in the criminal proceeding (Decision of the Higher Council of Justice No. 1975/0/15-20 dated June 25, 2020);

3. the judge took a formalistic approach to the case: without summoning the respondent, within a month he issued an unreasoned default judgment, thereby depriving the man of parental rights over his youngest daughter. Moreover, the judge resolved the issue of alimony payment in fixed amounts, even though the case lacked any evidence of the man’s financial status: the only document present was a copy of his passport (Decision of the Higher Council of Justice No. 363/0/15-21 dated February 16, 2021);

4. the judge unjustifiably applied measures to secure the claim, groundlessly suspending the effect of several city council decisions and the order of the city mayor, which were aimed at reorganization of state hospital, conducting a competition to fill the vacant position of senior doctor (Decision of the Higher Council of Justice No. 63/0/15-19 dated January 10, 2019);

5. in court decisions on imposition of arrest and refusal to remove it, it is not specified how property of private law legal entity can be evidence in a criminal proceeding against state enterprise officials (Third Disciplinary Chamber Decision No. 605/3am/15-19 dated February 27, 2019);

6. in the reasoning part of the decision on imposing an arrest, circumstances and evidence are not indicated, only the motion content is partially outlined and legislation is quoted (Decision of the Second Disciplinary Chamber No. 726/2dp/15-20 dated March 11, 2020);

7. while choosing a preventive measure, the investigating judge did not respond to the suspect’s notification concerning the use of violence against him; he did not clarify circumstances of violating a person’s right to freely choose a defense counselor; the choice of a preventive measure in favour of detention is justified solely by the severity of punishment; the preventive measure was applied without taking into account that the record of the vehicle search is inadmissible evidence, as the search was conducted without the necessary judicial act, and the exhibited document did not determine the date of it; as a result, the evidence was classified as omission to include the reasons for accepting or rejecting the arguments of the parties (Decision of the Higher Council of Justice No. 605/3dp/15-19 dated February 27, 2019).

In addition, in the case where the judge unjustifiably applied measures to secure the claim, groundlessly suspending the effect of several city council decisions and the order of the city mayor, which were aimed at reorganization of state hospital, conducting a competition to fill the vacant position of senior doctor, the investigating judge had seized 3003 land plots, which were leased by an agricultural company, but did not explain what circumstances of a criminal proceeding necessitated such a measure; did not justify how land plots could be used as evidence in the criminal proceeding (Decision of the Higher Council of Justice No. 1975/0/15-20 dated June 25, 2020).

Moreover, the judge resolved the issue of alimony payment in fixed amounts, even though the case lacked any evidence of the man’s financial status: the only document present was a copy of his passport (Decision of the Higher Council of Justice No. 363/0/15-21 dated February 16, 2021).

Das Verwaltungsgericht und die Verantwortung von Richtern zu

Es wurde eine Durchsicht wissenschaftlicher Arbeiten durchgeführt und über die Entwicklung und den aktuellen Stand dieser Problematisierung informiert.

Es wurden Beispiele für richterliches Vorgehen herausgegriffen, bei denen in der Gerichtsentscheidung eine Grundlage für die Annahme oder Ablehnung der Argumente der Parteien zum Inhalt des Streits angegeben wurden.


obtaining the court’s permission (Decision of the Third Disciplinary Chamber No. 3919/3dp/15-17 dated December 6, 2017);

court judgment does not specify reasons for rejecting the party’s arguments that it could not have been aware of the inauthenticity of documents provided for the car customs clearance (Decision of the Third Disciplinary Chamber No. 2511/3dp/15-17 dated August 23, 2017);

stating in the court’s ruling that a person denies his/her guilt in driving while intoxicated and providing no legal evaluation of the fact that an administrative offense record was drawn up in connection with refusal by a person to undergo a breathalyzer test (Decision of the Third Disciplinary Chamber No. 1400/3dp/15-18 dated May 16, 2018);

application of a preventive measure in the form of detention without stating reasons for rejecting the defense arguments (Decision of the First Disciplinary Chamber No. 1204/1dp/15-18 dated April 20, 2018);

the decision does not specify which actions are illegal, what damages the plaintiff has suffered, and does not establish a causal link between actions of the party and the damage caused (Decision of the First Disciplinary Chamber No. 675/1dp/15-20 dated March 4, 2020);

the judge issued a court decision to leave the claim without consideration because that the plaintiff was delaying consideration of another civil case (Decision of the Third Disciplinary Chamber No. 2054/3dp/15-20 dated July 8, 2020);

in a civil case on debt recovery, the judge secured the claim by suspending sale of the seized property, whereas the procedural legislation stipulates the possibility of applying such a type of claim security only to a claim related to recognizing property ownership rights and to lifting its seizure (Decision of the First Disciplinary Chamber dated September 18, 2020 No. 2662/1dp/15-20);

it is unclear whether the prejudicial ruling has come into legal force; the circumstances established by it were not included (decision of the First Disciplinary Chamber No. 99/1dp/15-20 dated January 17, 2020);

the judge unjustifiably moved away from the existing judicial practice, forbidding defendants from using their authority to conduct or continue the qualification assessment of judges until a certain decision came into legal force (Decision of the First Disciplinary Chamber No. 2437 /1dp/15-19 dated September 13, 2019).

Let us consider debatable issues raised at the beginning of the article, namely decisions related to the merits of the dispute within the meaning of subclause “b” of clause 1 of Article 106 of the Law of Ukraine On the Judiciary and the Status of Judges and the problem of applying subclause “b” of clause 1 of Article 106 of the Law of Ukraine On the Judiciary and the Status of Judges in respect of judges for lack of reasoned judicial decisions on the application of measures to ensure a criminal proceeding, measures to secure the claim, renewal of procedural time limits, etc.

At the legislative level, there is no definition of the dispute merits concept. According to the explanatory Dictionary of the Ukrainian language, merits is the essential, the main thing in something 13. Obviously, conclusions concerning the

13 Словник української мови. URL: https://slovnyk.ua/index.php?swrd=%D1%81%D1%83%D1%82%D1%8C

Archives of Criminology and Forensic Sciences № 1 (7). 2023
application of legal norms in resolving key issues differ from those conclusions expressed as *obiter dictum*, i.e., which do not outline the merits of the dispute and serve as additional argumentation 14. Therefore, the question arises about bringing disciplinary proceedings against a judge by the High Council of Justice for the decisions he made, which did not concern the resolution of the court dispute on the merits, but concern, for example, procedural time limits renewal.

According to the Decision of the Second Disciplinary Chamber No. 3621/2dp/15-17 dated November 8, 2017, the party that appealed with a cassation complaint has the right to understand the reason for time limits renewal. Disciplinary authority notes that such a decision is not subject to appeal, so it is important to reflect those circumstances that are taken into account. Subclause “b” of clause 1 cannot be interpreted in a narrow sense as making a decision only on the merits of the case. The merits of the dispute concept is used in a wider sense, namely as any issue on the basis of which the judge adopts a decision. It can also relate to consideration of procedural time limits renewal. However, the High Council of Justice, by Decision No. 364/0/15-18 dated February 6, 2018, reversed the decision of the Second Disciplinary Chamber No. 3621/2dp/15-17 dated November 8, 2017, stating that such a conclusion was erroneous and that, in a narrow sense, the merits of the dispute should be understood as the merits of the claim 15.

We do not share the aforementioned position of the High Council of Justice. Let’s stress that such decisions were not rare. The High Council of Justice drew similar conclusions regarding consideration of issues on taking measures to secure the claim, asserting that these issues do not concern resolution of the dispute on the merits. In view of this, the lack of reasoning in relevant court decisions does not constitute a disciplinary offense 16.

In our opinion, the High Council of Justice practice was more justified when actions of the judge were classified under subclause “b” of clause 1 and under decisions adopted that did not concern the resolution of the court dispute on the merits 17. From our perspective, the importance of such issues as the renewal of procedural time limits, the implementation of measures to secure a claim, the application of measures to ensure criminal proceedings, and the granting of permission for investigative (search) actions is so high that providing a statement of reasons for court decisions on these matters must be obligatory, as it serves as a guarantee against arbitrariness. It facilitates the understanding of the decision and its acceptance by the parties. The parties have the right to follow the logic of reasoning based on which a judge made a decision (clauses 3, 35, 36 of Conclusion No. 11 (2008) of the Consultative Council of European Judges). The requirement to present the judge made a decision (clauses 3, 35, 36 of Conclusion No. 11 (2008) of the Consultative Council of European Judges). The requirement to present the main reasons for the drawn decision is provided by the procedural legislation. The European Court of Human Rights has also unequivocally stated that national courts are obliged to motivate the renewal of time limits for appeal and to ensure that the grounds for such renewal justify the interference with

14 Ухвали КГС у складі ВС від 19.01.2022 по справі № 910/22858/1. URL: https://reysestr.court.gov.ua/Review/102854560

15 Рішення від 08.11.2017 № 3621/2мн/15-17. URL: https://hcj.gov.ua/doc/doc/26406,
скасовано рішенням ВРП від 06.02.2018 № 364/0/15-18. URL: https://hcj.gov.ua/doc/doc/25546

залишено без змін постановою ВП ВС від 24.01.2019 по справі № 11-9879ар1. URL: https://reysestr.court.gov.ua/Review/79439747

17 Рішення ВРП від 25.06.2020 № 1976/0/15-20. URL: https://hcj.gov.ua/doc/doc/7227,
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The issue of renewing procedural time limits concerns correct interpretation of such an evaluative concept as valid reasons for its delay, and the issue of taking measures to ensure a criminal proceeding: such evaluative concepts as reasonableness of suspicion and the presence of risks of negative consequences for a criminal proceeding. Under these circumstances, it is important to state the reasons for making relevant decisions. Where there are evaluative concepts, the requirement for motivated court decisions is greater than in cases where the court applies formally defined norms of law. We deem that regardless of the type of procedural decision, judges need to consider requirements that procedural law imposes on them. Therefore, actions of judges who did not lay out reasons for adoption in their decisions should be classified under subclause “b” of clause 1 of Article 106 of the Law of Ukraine On The Judiciary and The Status of Judges.

According to the legal position of the Grand Chamber of the Supreme Court set out in the ruling dated 09.09.2021 in case No. 11-21sap21, the grounds for disciplinary action against a judge, as defined in subclause “b”, are applicable to court decisions regardless of which law governs their adoption, and whether the concepts of party and merits of the dispute exist in the relevant process under that law. A similar legal position is set out in the ruling of the Grand Chamber of the Supreme Court dated 23.09.2021 in case No. 11-90sap21. It states that the procedural requirement for a reasoned decision on the merits is a manifestation of the very nature of the decision as an act containing answers to the legal questions that have arisen in a case and determining actions that must be taken in connection with the established factual circumstances. Since every decision is taken in the light of certain factual circumstances, all procedural activities that take place before a decision is draw ultimately consist of collecting, examining and evaluating the factual data (evidence) with the help of which certain decisions are made and which in fact substantiate them. At the heart of each court decision should be factual circumstances established in a case, indicating the presence of grounds with which the law associates the possibility of making this decision.

Conclusions. In line with the Decision of the National Security and Defense Council of Ukraine On Judicial Reform Acceleration and Overcoming Corruption Manifestations in the Justice System dated June 23, 2023, to restore trust in the judiciary, it is vital to review and adjust the procedure for taking disciplinary measures against judges. This includes providing clear definitions for each ground for disciplinary action, corresponding disciplinary punishments, as well as conditions and terms for their termination while applying the best global practices.

In order to introduce substantial changes to the grounds for disciplinary action against judges, it's not enough to simply compare the legislative texts of such grounds in Ukraine and European countries. It is necessary to study their disciplinary practices and compare the reasons for which judges are held

19 Рішення Ради національної безпеки і оборони України від 23 червня 2023 року «Про прискорення судової реформи та подолання проявів корупції у системі правосуддя». URL: https://zakon.rada.gov.ua
20 Там само.
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disciplinarily liable in our country versus in European countries. Conducting such research, it’s crucial to remember that disciplinary action against judges cannot be examined separately from other types of legal liability (criminal, administrative, civil). It is quite possible that something that would be considered a disciplinary offense in Ukraine might be serious enough to be treated as a criminal offense in some European countries.

Conducting such a comprehensive comparative study of the disciplinary practice in Ukraine and European Union countries is an important future task for the High Council of Justice. In our view, a new version of Article 106 of the Law of Ukraine On the Judiciary and the Status of Judges can be proposed only after studying and summarizing national disciplinary practice and further comparative research with the practice of European Union countries. We emphasize that what needs to be compared is not the texts of laws, but the actual disciplinary practice.

From our perspective, different practices of the High Council of Justice and its chambers regarding application of subclause “b” of clause 1 have resulted not only from differing interpretations of the merits of the dispute concept, but also from different understanding by lawyers of correlation between subclause “b” of clause 1 and clause 4 of Article 106 of the Law of Ukraine On the Judiciary and the Status of Judges. After all, not stating in the court decision reasons for accepting or rejecting the parties’ arguments essentially also constitutes a violation of the right to a fair trial, the liability for which is envisaged in clause 4 of Article 106 of the Law On the Judiciary and the Status of Judges. How does the ground for disciplinary action stipulated in subclause “b” of clause 1 of the stated law relate to other grounds such as those in clause 4 of Article 106 of the Law On the Judiciary and the Status of Judges (in which cases there is competition, and in which the committed needs to be classified by the totality of disciplinary offenses)? The problems mentioned in the article, along with other controversial issues raised, do not claim to be exhaustive and highlight the need for further scientific research.

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Received by Editorial Board: 26.08.2023

Suggested Citation: