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PROBLEMATIC ISSUES OF PROVISIONAL SUSPENSION OF A JUDGE FROM ADMINISTRATION OF JUSTICE DUE TO CRIMINAL LIABILITY

Abstract. ***Purpose***. The purpose of the article is to identify the problematic issues of provisional suspension of a judge from the administration of justice due to criminal liability and to determine the ways to resolve them. ***Results.*** The article determines that one of the problems in the field of criminal procedural relations is the issue of bringing to criminal liability persons holding a particularly responsible position, including judges. However, in addition to direct prosecution, the pre-trial investigation also addresses the issue of provisional suspension of a judge from the administration of justice due to criminal liability. A legal state shall ensure that the criminal proceedings against these individuals do not violate constitutional principles, including the equality before the law and courts. This procedure should protect the individual, society, and the state, as well as create an enabling environment for the detection of crimes, exposure of perpetrators and their conviction, that requires the procedure for implementing these guarantees to be clearly regulated by appropriate legal provisions. One of the problems in the field of criminal procedural relations is the issue of bringing to criminal liability persons holding a particularly responsible position, including judges. However, in addition to direct prosecution, the pre-trial investigation also addresses the issue of provisional suspension of a judge from the administration of justice due to criminal liability. ***Conclusions.*** The author concludes that the provisional suspension of a judge from the administration of justice due to criminal liability has a number of problematic aspects: it is questionable whether the High Council of Justice should be vested with the function of making a decision on suspension of a judge from the administration of justice; the issue of appealing against a judge's decision to apply this measure, as well as the procedure for appealing against a decision by the Prosecutor General or his/her deputy to refuse to apply it, remains unresolved; the procedure for applying this measure to judges holding administrative positions is not regulated. The criminal procedure legislation does not provide for a separate procedure for the suspension from office of a judge of the Constitutional Court of Ukraine.

Key words: judge, criminal liability, provisional suspension from administration of justice, regulatory framework, mechanism, problems of implementation.

1. Introduction

One of the problems in the field of criminal procedural relations is the issue of bringing to criminal liability persons holding a particularly responsible position, including judges. However, in addition to direct prosecution, the pre-trial investigation also addresses the issue of provisional suspension of a judge from the administration of justice due to criminal liability. A legal state shall ensure that the criminal proceedings against these individuals do not violate constitutional principles, including the equality before the law and courts. This procedure should protect the individual, society, and the state, as well as create an enabling environment for the detection of crimes, exposure of perpetrators and their conviction. This establishes guarantees for the implementation of legal provisions (Udalova and Babii, 2010, p. 4), but the implementation of these guarantees should be clearly regulated by appropriate legal provisions. In particular, the existing procedure for the provisional suspension of a judge from the administration of justice due to criminal liability raises a number of problematic issues: does the suspension of a judge from the administration of justice entail his or her automatic removal from the administrative position held

in the court? And vice versa, can a judge be removed from his or her administrative position in case of criminal prosecution without being suspended from the administration of justice? It also seems that the provision on the possibility of appealing against the decision of the High Council of Justice to apprehend or detain a judge was not introduced by chance. On the one hand, the High Council of Justice seems to have performed its work in good faith within the scope of its powers and agreed to apply the said measure of restraint to the judge who has violated the requirements of criminal law. On the other hand, the judge cancels the decision of the High Council of Justice on appeal and thereby completely neutralises the activity of this high collegial independent body of justice in this part. The above has given scholars grounds to argue that these provisions of the Law of Ukraine "On the High Council of Justice" contradict certain provisions of the CPC of Ukraine in terms of the possibility of appealing against the decision of the High Council of Justice to grant consent to the detention of a judge, and the provisions on the possibility of appealing against the decision to grant consent to the apprehension of a judge are not provided for by the CPC at all (Fedchenko, Luchko, 2017, p. 180). These and other issues give rise to a number of problematic issues of the said mechanism of suspension of a judge that require appropriate research.

Scholars who have conducted research in this area have identified certain problems of provisional suspension of a judge from the administration of justice. B.M. Fedchenko and O.A. Luchko argue that the legislative position on the possible appeal against the decision of the High Council of Justice to grant consent to the apprehension or detention a judge is not clear, provided that the decision made on this appeal is final and not subject to further appeal (Fedchenko, Luchko, 2017, p. 180). P.D. Arlanova and S.V. Zavada believe that the issue of suspending judges from the administration of justice should be resolved only with the participation of the court, that is, the issue should be resolved exclusively by the Supreme Court of Ukraine and argue that the approach regulated in the legislation of Ukraine to resolving the issue of suspension of judges from the administration of justice contradicts the European principles of justice, since the case law of the ECHR proceeds from the fact that one of the key aspects of the rule of law is a clear control by the courts over the interference of the executive branch in the life of a person (Arlanova, 2017, pp. 148–149). S.V. Hladii proposes to establish a Disciplinary Court of Ukraine, which would deal with issues related to the activities of judges, including their suspension from the administration of justice (Hladii, 2014, p. 65). Thus, it can be stated that the problems of regulating the provisional suspension of a judge from the administration of justice have not been systematised in a comprehensive manner.

The purpose of the article is to identify the problematic issues of provisional suspension of a judge from the administration of justice due to criminal liability and to determine the ways to resolve them.

2. The regulatory framework for a provisional suspension of a judge from administration of justice due to criminal liability

According to the CPC of Ukraine, Article 154, part 3, the issue of suspension from office of persons (judges and judges of the Constitutional Court of Ukraine) appointed by the President of Ukraine is decided by the President of Ukraine on the basis of a motion by the prosecutor in accordance with the manner established by law. Pursuant to Article 80 of the Law of Ukraine "On the Judicial System and Status of Judges", the President of Ukraine appoints judges on the basis of and in the scope of a proposal by the High Council of Justice, without verifying compliance with the requirements for candidates for the position of judge and the procedure for selecting or evaluating candidates. The President of Ukraine issues a decree on the appointment of a judge no later than thirty days after receiving the relevant submission from the High Council of Justice. Moreover, the above rules are general. Special in this case is Article 155-1 of the CPC of Ukraine, which provides that the decision to temporarily suspend a judge from the administration of justice due to criminal liability is made by the High Council of Justice on the basis of a reasoned motion of the Prosecutor General or his/her deputy in the manner established by law. That is, this happens on the basis of an application from an official who is responsible for notifying a judge of suspicion, namely the Prosecutor General or his/her deputy. This procedure is regulated comprehensively in the Rules of Procedure of the High Council of Justice. For example, in accordance with clause 19.1 (Chapter 19 of the Rules), a judge may be suspended from the administration of justice by a decision of the Council: a) due to criminal liability; b) when undergoing a qualification assessment; c) as a matter of a disciplinary sanction. For this purpose, the Prosecutor General or his/her deputy submits a motion to the High Council of Justice regarding a judge who is a suspect, accused (defendant) at any stage of criminal proceedings. The motion shall be well-reasoned and be in line with requirements, namely, include: short statement on circumstances of the criminal

offence with regard to which the motion is being filed; legal qualification of the criminal offence with reference to the article (part of the article) of the law of Ukraine on criminal liability; a statement of circumstances giving grounds to suspect or accuse the judge of committing a criminal offence with reference to the circumstances; the name of the court where the judge holds office; a statement of circumstances providing grounds to believe that the judge while holding the office will destroy or counterfeit items and documents that are of significant importance for the pretrial investigation, by illicit means will influence witnesses and other participants of the criminal proceedings or unlawfully hinder the criminal proceedings in other way; a list of witnesses that the prosecutor considers necessary to be interrogated when the motion is reviewed (Rules of Procedure of the High Council of Justice, 2017). In addition, the motion shall be added with copies of the materials supporting arguments of the motion, together with the documents confirming that the judge was provided with a copy of the motion and the supporting materials. Failure to comply with at least one of these requirements is grounds for returning the motion. The ruling to return the motion shall not be subject to appeal. However, the return of a motion shall not hinder a repeated motion to the Council according to the general procedure after the drawbacks are ousted (Rules of Procedure of the High Council of Justice, 2017).

However, the analysis of the current legislation does not reveal whether the procedure for returning a motion that does not meet the legal requirements is a right or a duty of the High Council of Justice. In addition, neither the Rules of Procedure of the High Council of Justice nor the CPC of Ukraine specify the timeframe within which the motion is returned to the submitter of the motion after the inconsistency is established. This motion shall be reviewed by the Council without delay but no later than seven days after the date of its receipt. The submitter of the motion, as well as the judge in respect of whom it was submitted to the High Council of Justice, shall be notified of the date, time and place of review of the motion no later than three calendar days before the Council session, and the notice of review of the motion shall be immediately published at the official website of the Council. Failure of the judge, his/her representative, the Prosecutor General or his/her deputy, or a prosecutor authorised by either of the two to attend the session of the Council, provided they were properly notified of the date, time and venue of the session, shall not preclude the motion from being reviewed (Rules of Procedure of the High Council of Justice, 2017). This is done regardless of the validity of the reasons for the absence of these participants. Allowing for the above legislative requirements, we see that the judge's explanation of the circumstances set out in the motion is not a prerequisite for continuing the procedure for reviewing the motion. That is, the judge may either provide explanations in writing, express his/her position, or refuse to provide any explanations at all. If the judge, duly notified of the date, time and place of review of the motion, does not appear for its review, but provides written explanations, they are announced in a mandatory manner. The position of the submitter of the motion is heard only if he or she appears at the hearing. In addition, when reviewing a motion for the provisional suspension of a judge from the administration of justice, the Council has the right to hear any person or examine any materials that matter for deciding upon the suspension of the judge from the administration of justice (Rules of Procedure of the High Council of Justice, 2017).

In addition, the Rules of Procedure of the High Council of Justice do not stipulate what circumstances the Council shall establish and consider when reviewing a motion for provisional suspension of a judge from the administration of justice, as well as make a decision based on the results of its review. We believe that the Council should be guided by the general requirements of Article 157 of the CPC of Ukraine, namely: to refuse to satisfy the motion for suspension from the administration of justice unless the prosecutor proves prove existence of reasonable grounds to believe that this measure is necessary to stop a criminal offence, stop or prevent unlawful behaviour of a suspect or accused who, while in office, may destroy or counterfeit items and documents that are of significant importance for the pretrial investigation, by illicit means will influence witnesses and other participants of the criminal proceedings or unlawfully hinder the criminal proceedings in other way. When deciding on this issue, the Council shall consider the following circumstances: the legal grounds for suspension from the administration of justice; sufficiency of evidence indicating that the person has committed a criminal offence; effects of suspension from the administration of justice for other persons (Criminal Procedure Code of Ukraine, 2012).

Therefore, following the review of the motion, the Council may make one of the following decisions: to return the motion due to non-compliance with the requirements of the Law; to provisionally suspend the judge from administering justice due to criminal liability; to dismiss the motion.

3. Particularities of the procedure for deciding on provisional suspension of a judge from administration of justice due to criminal liability

The decision of the Council on the suspension shall contain the suspension term, which may not exceed two months. At the trial stage of proceedings, a term of suspension shall be set before a verdict of the court enters into force or criminal proceedings are closed. The resolution part of the decision shall be announced to those present at the session. Copies of the Council's decision shall be sent to the Prosecutor General or his/her deputy, the judge in respect of whom the decision was made, no later than seven working days (Rules of Procedure of the High Council of Justice, 2017).

As for the implementation of this decision, the judge is considered suspended from the administration of justice from the moment the Council issues a ruling on this. Therefore, on the day of the Council's decision, the Chairperson of the court where the suspended judge holds office shall be notified of the decision. The notification shall take place by means of official communication: e-mail and/or fax (telefax) of the respective court, via the Integrated Database of E-mails, fax (telefax) numbers of authorised persons/bodies and data of the official web-portal "The Judiciary" (Rules of Procedure of the High Council of Justice, 2017). If the criminal proceedings against the judge are subsequently closed, the decision to suspend a judge from office shall be discontinued even if the term for which it was imposed has not expired.

Further extension of the term of provisional suspension of a judge from the administration of justice may not exceed two months, and if the indictment is submitted to the court, it shall be until the end of the court proceedings (Rules of Procedure of the High Council of Justice, 2017). For this purpose, the Prosecutor General or his/her deputy shall apply no later than ten days before the expiry of the term for which the judge was suspended. The general procedure for deciding on a motion to extend the suspension is the same as for deciding on the first motion, that is, on the provisional suspension of a judge from the administration of justice. However, it is specific, in particular, it states that a motion to extend the provisional suspension of a judge shall prove that the circumstances that provided grounds for his/her provisional suspension from the administration of justice continue to exist, and the prosecution was unable to reach goals justifying the provisional suspension by other means while the previous decision was effective. Accordingly, the High Council of Justice, when considering this motion, shall establish: the circumstances providing the grounds for the provisional suspension from the administration of justice continue to exist; whether the prosecution was unable to reach the goals justifying the provisional suspension from the administration of justice by other means during the validity of the previous decision was effective (Rules of Procedure of the High Council of Justice, 2017). Therefore, only in the presence of these two circumstances in the aggregate, the Council decides to extend the suspension.

A repeated motion by the Prosecutor General or his/her deputy for provisional suspension of a judge from the administration of justice, as well as a motion for extension of such suspension, due to criminal liability within the same criminal proceedings, if the Council has already made a decision on the merits of this issue, is not allowed, except for cases where the previous decision adopted by the Council is reversed by a court (Rules of Procedure of the High Council of Justice, 2017).

With regard to these issues, it should be assumed that the provisional suspension of a judge from the administration of justice as a measure to ensure criminal proceedings is aimed at preventing a suspect or accused from performing his or her official duties for a certain period of time. This is done in order to stop a criminal offence, to stop unlawful behaviour, to prevent unlawful behaviour of a person who, while in office, can destroy or counterfeit items and documents that are of significant importance for the pretrial investigation, by illicit means will influence witnesses and other participants of the criminal proceedings or unlawfully hinder the criminal proceedings in other way (Tatsiia, Hroshevoho, Kaplinoi, Shylo, 2013, p. 256; Farynnyk, 2014, p. 163). In a narrower sense, it is a measure to ensure criminal proceedings, implying temporary, forced prevention of an official from performing his/her functional duties and applied to a person suspected or accused of committing a crime (Kovalenko, Udalova, Pysmennyi, 2013, p. 200). Therefore, we believe that in order to prevent possible influence on the part of the judge on the pre-trial investigation against him/her, he/she should be completely removed from performing any official duties.

As for the suspension from office of a judge of the Constitutional Court of Ukraine, according to the Law of Ukraine "On the Constitutional Court of Ukraine", Article 9, Part 2, the President of Ukraine, the Verkhovna Rada of Ukraine and the Congress of Judges of Ukraine appoint six judges of the Constitutional Court of Ukraine each. Meanwhile, the question arises as to how to

suspend the judges of the Constitutional Court of Ukraine (there are 12 of them left), appointed by the Verkhovna Rada of Ukraine and the Congress of Judges of Ukraine, since the provision of the CPC of Ukraine, Article 154, part 3, refers only to officials appointed by the President of Ukraine. For some reason, the legislator left this issue unaddressed, which deprives law enforcement agencies of the opportunity to dismiss the latter from office.

It should be noted that the procedure for granting consent to the application of measures to ensure criminal proceedings against judges, compared to people's deputies, is more or less clear. Therefore, the procedural mechanism for granting consent to the application of measures of restraint against a judge, in our opinion, seems to be more objective and fairer than in relation to people's deputies. The primary argument in favour of this is that the motion is reviewed by an independent body, the High Council of Justice, where the judge is not an official. In addition, the High Council of Justice is composed of various representatives, namely: ten are elected by the Congress of Judges of Ukraine from among judges or retired judges; two are appointed by the President of Ukraine; two are elected by the Verkhovna Rada of Ukraine, the Congress of Advocates of Ukraine, the All-Ukrainian Conference of Prosecutors, the Congress of Representatives of Law Schools and Research Institutions (Law of Ukraine On the High Council of Justice, 2016). At the same time, a similar procedure is carried out by the Verkhovna Rada of Ukraine in relation to a people's deputy. This is the same as if a panel of judges of a separate court were reviewing a motion or application for an interim measure in criminal proceedings against a judge of the same court. Of course, one can refer to the fact that different political forces are represented in the Parliament, which ensures greater objectivity and impartiality in the review of the motion against a people's deputy. Instead, in order to impose a measure of restraint on a people's deputy, it is necessary to obtain the consent of the Parliament, which, in our opinion, is a significant obstacle to the implementation of these measures, especially if the motion is made against a people's deputy belonging to the ruling majority.

The issue of applying these measures of restraint to a CCU judge is decided at a special plenary session of the Court upon the proposal of the Prosecutor General or a person exercising his/her powers. This approach seems dubious, as it raises the question of the ability of CCU judges to decide on the choice of a measure of restraint objectively and impartially against their colleague. In our opinion, it would be more appropriate to refer this issue to the powers of the High Council of Justice, which, firstly, is an independent constitutional body, and secondly, is a collegial body.

4. Conclusions

The provisional suspension of a judge from the administration of justice due to criminal liability has a number of problematic aspects: it is questionable whether the High Council of Justice should be vested with the function of making a decision on suspension of a judge from the administration of justice; the issue of appealing against a judge's decision to apply this measure, as well as the procedure for appealing against a decision by the Prosecutor General or his/her deputy to refuse to apply it, remains unresolved; the procedure for applying this measure to judges holding administrative positions (the Chairman of the Court and his/her deputy) is not regulated. The criminal procedure legislation does not provide for a separate procedure for the suspension from office of a judge of the Constitutional Court of Ukraine.

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ПРОБЛЕМНІ ПИТАННЯ ТИМЧАСОВОГО ВІДСТОРОНЕННЯ СУДДІ ВІД ЗДІЙСНЕННЯ ПРАВОСУДДЯ У ЗВ'ЯЗКУ З ПРИТЯГНЕННЯМ ДО КРИМІНАЛЬНОЇ ВІДПОВІДАЛЬНОСТІ

Анотація. ***Мета***. Метою статті є виокремлення проблемних питань тимчасового відсторонення судді від здійснення правосуддя у зв'язку з притягненням до кримінальної відповідальності та визначення шляхів їх вирішення. ***Результати.*** У статті визначено, що однією з проблем у сфері кримінальних процесуальних відносин є питання притягнення до кримінальної відповідальності осіб, які займають особливо відповідальне становище, у тому числі і суддів. Але, крім безпосереднього притягнення, у процесі досудового розслідування вирішується також питання тимчасового відсторонення судді від здійснення правосуддя у зв'язку з притягненням до кримінальної відповідальності. Правова держава повинна забезпечити порядок провадження кримінальної справи щодо цих осіб, який не порушуватиме конституційних принципів, зокрема рівності всіх перед законом і судом. Такий порядок повинен стояти на захисті людини, суспільства, держави, а також створювати умови для розкриття злочинів, викриття винних та їх засудження, для чого процедура реалізація цих гарантій повинна бути чітко регламентована шляхом створення відповідних правових приписів. ***Висновки.*** Зроблено висновок, що тимчасове відсторонення судді від здійснення правосуддя у зв'язку з притягненням до кримінальної відповідальності має ряд проблемних аспектів: сумнівним видається наділення функцією прийняття рішення про відсторонення судді від здійснення правосуддя Вищої ради правосуддя; залишається невирішеним питання щодо оскарження прийнятого суддею рішення про застосування такого заходу, а також порядок оскарження Генеральним прокурором або його заступником рішення про відмову в його застосуванні; не унормований порядок застосування такого заходу щодо суддів, які займають адміністративні посади. У кримінальному процесуальному законодавстві не визначено окремий процесуальний порядок відсторонення від посади судді Конституційного Суду України.

Ключові слова: суддя, притягнення до кримінальної відповідальності, тимчасове відсторонення від здійснення правосуддя, регламентація, механізм, проблеми реалізації.

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