The Right of Appeal against a Decision on Disciplinary Liability of a Judge

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Abstract

This article deals with the questions of scope and the standard of judicial review of a disciplinary decision against a judge. It further addresses the issue of remedial powers, which should be granted to the reviewing authority in this type of cases. It is suggested that the scope of judicial review of a disciplinary decision against a judge should extend to questions of law, fact and discretion. What actually varies is the depth of review or, more precisely, the standards of review and the corresponding level of deference, which must be demonstrated to the primary decision-making authority. It is further suggested that there are several factors that have influence on the formation of the standards of review: the institutional, procedural and expertise factors. As to the remedial capacity, the reviewing court should be provided with the competence to apply adequate remedial measures. The reviewing court should be able to effectively eliminate the identified shortcomings in the proceedings before the first-instance authority. For the effective protection of the rights at issue, it may be important for the reviewing court not only to repeal the decision subject to review, but also take other remedial measures. The legitimacy and necessity for applying particular remedial action should be established by taking into account the same institutional, procedural and expertise factors.

Keywords: disciplinary proceedings, scope of judicial review, standard of judicial review, remedial measures.

1. Introduction

Today it is a well-recognized principle that a judge facing disciplinary charges should be entitled to basic procedural safeguards in order to ensure that his disciplinary case is examined in a fair manner. The idea of due process guarantees has been reflected in the international texts, initially referring to the right of a judge to a hearing.[1] This right has been developed on the European level as implying "all

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1 International Bar Association, *Minimum Standards of Judicial Independence,* 1982, § 27; Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, § 26.

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the guarantees of a fair trial".[2] In the European Union (EU), apart from the institutional guarantees of independent disciplinary authority, proposals have been made that in the disciplinary proceedings the judge should be provided with the right to be fully informed of the case against him and the full right of defence, including the right to have a representative of his own choosing, to appear before any hearing and to be heard, to call evidence either in writing or orally, to be given a timetable for the investigation of the complaint and the making of the decision, to be provided with the reasons of the decision adopted by the relevant disciplinary body and to appeal against that decision.[3]

This call to secure procedural rights in the disciplinary case is natural and does not raise any particular objections. However, the judicial discipline proceedings have their peculiarities, which should be taken into account when discussing the scope of the procedural guarantees. Therefore, while many procedural safeguards are generally acknowledged, there is no uniform approach in their understanding and implementation in the context of a disciplinary case against a judge. One of the issues that has not been settled so far in the doctrine is the question about the right to challenge the disciplinary decision: should such a right be provided, and, if so, what should be the scope and standard of the appeal review? Finally, what should be the remedial competence of the reviewing authority to preserve the balance between the primary decision-making body and the appellate jurisdiction?

2. Approach in International Law

2.1. General View under the European Convention of Human Rights

The requirement of availability of judicial appeal in disciplinary cases cannot be easily deduced from the European Convention on Human Rights (Convention) or its additional protocols. In the framework of this international treaty, the right of appeal is expressly mentioned in relation to 'criminal matters' only. Furthermore, one of the exceptions is that this right does not extend to cases where the conviction was pronounced by the highest domestic tribunal. It goes about Article 2 of Protocol No. 7 to the Convention, which provides:

> 1 Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
> 2 This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned

2 Committee of Ministers of the Council of Europe, *Recommendation CM/Rec(2010)12 to Member States on Judges: Independence, Efficiency and Responsibilities,* 17 November 2010, § 69.

3 European Network of Councils for the Judiciary, *Report Development of Minimum Judicial Standards V 2014-2015*, The Hague, 5 June 2015, pp. 37 and 38, available at: www.csm1909.ro/ViewFile.ashx?guid=056d4248-5448-4277-ae64-f6e10a758acd%7CInfoCSM (last accessed 16 January 2019).

> was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.[4]

Based on the current interpretation of the Convention, it could be argued that the disciplinary proceedings against a judge will not usually fall under the concept of 'criminal charge' in the meaning of Article 6 of the Convention.[5] This conclusion has direct relevance for the applicability of Article 2 of Protocol No. 7, which is limited by the concept of 'criminal offence' interpreted in the light of what is a 'criminal charge' for the purpose of Article 6.[6] Accordingly, as long as the 'disciplinary proceedings' do not acquire features of the 'criminal proceedings' for the purpose of the Convention, they would not fall under Article 2 of Protocol No. 7.

On the other hand, the disciplinary proceedings for judicial misconduct may affect civil rights of the judge concerned and in that light the judge will be entitled to a fair trial under Article 6 § 1 of the Convention.[7] That provision of the Convention guarantees the right of 'access to a tribunal', but it does not secure the right to appellate review if appeal instance is not established in the domestic system. The European Court of Human Rights (ECHR) has stated on many times that:

> Article 6 of the Convention does not compel the Contracting States to set up courts of appeal or of cassation. However, where such courts do exist, the guarantees of Article 6 must be complied with, for instance in that it guarantees to litigants an effective right of access to the courts for the determination of their civil rights and obligations.[8]

It has to be borne in mind that in the systems where judicial councils are entrusted with the disciplinary function and empowered to determine the facts, the law and the penalty in a disciplinary case against a judge, these judicial councils may be regarded as 'tribunals' for the purpose of Article 6 of the Convention, even though the councils are not placed in the system of classic courts. For example, such a conclusion was reached by the ECHR in the case against Croatia after examining the status of the national judicial council and the features of the proceedings before that authority.[9]

This means in turn that, strictly speaking, the Contracting States would not be compelled under the Convention to set up the court of appeal for a disciplinary case (involving civil rights of the judge), which has been resolved by the judicial council in the capacity of the first-instance tribunal. The guarantees of Article 6 would apply to the second-level tribunal, however, if the States have decided on

4 Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22.XI.1984.
5 *Oleksandr Volkov v. Ukraine*, No. 21722/11, §§ 92-95, ECHR 2013.
6 *Zaicevs v. Latvia*, No. 65022/01, § 53, 31 July 2007.
7 *Baka v. Hungary* [GC], No. 20261/12, §§ 100-106, ECHR 2016.
8 *Zubac v. Croatia* [GC], No. 40160/12, § 80, 5 April 2018.
9 *Olujić v. Croatia*, No. 22330/05, § 42, 5 February 2009.

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their own volition to establish a judicial review procedure for decisions of such disciplinary authority.

2.2. Treating the Issue under the Other International Texts

The international texts dealing with disciplinary liability of judges include the right of a judge to appeal against the disciplinary decision. Initially, this right was drafted with express reservations as regards the highest judicial body or legislature imposing discipline. Notably, in 1985, the UN Basic Principles on the Independence of the Judiciary provided that:

> 20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.[10]

Subsequently, those reservations were no longer expressly mentioned. In 1998, the European Charter on the statute for judges provided:

> 5.1. ...The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority.[11]

According to the explanatory report to the Charter, it provides for a right of appeal to a higher judicial authority against any decision to impose a sanction taken by an executive authority, tribunal or body, at least half of whose membership are elected judges. Accordingly, the right of appeal was extended to the effect that even with the independent authority acting in the first instance, there should be a right of appeal to a court of law. Nevertheless, the explanatory report specified that the wording of this provision did not require the availability of such a right of appeal against a sanction imposed by Parliament.

The idea of granting the judges the right of appeal in disciplinary proceedings was upheld and developed by the Consultative Council of European Judges (CCJE) – a body set up by the Council of Europe in 2000 – who stated in 2002 that:

> ... 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.[12]

10 UN Basic Principles on the Independence of the Judiciary, 29 November and 13 December 1985.

11 Council of Europe, Department of Legal Affairs, *European Charter on the Statute for Judges*, § 5.1 (DAJ/DOC (98)23), Strasbourg, 8-10 July 1998, available at: https://rm.coe.int/16807473ef (last accessed 16 January 2019).

12 Consultative Council of European Judges, *Opinion No. 3 (2002) on the Principles and Rules Governing Judges' Professional Conduct, in Particular Ethics, Incompatible Behaviour and Impartiality*, Strasbourg, 19 November 2002, § 77 (v), available at: https://rm.coe.int/16807475bb%20-%20P228_38580 (last accessed 16 January 2019).

Before making this conclusion, the CCJE pointed out that even though in some countries the initial disciplinary body is the highest judicial body, 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.[13]

In 2007, in the same line of reasoning, the CCJE provided the following considerations:

> 39. Some decisions of the Council for the Judiciary in relation to the management and administration of the justice system, as well as the decisions in relation to the appointment, mobility, promotion, discipline and dismissal of judges (if it has any of these powers) should contain an explanation of their grounds, have binding force, subject to the possibility of a judicial review. Indeed, the independence of the Council for the Judiciary does not mean that it is outside the law and exempt from judicial supervision.[14]

In 2010, the Committee of Ministers of the Council of Europe made a recommendation that the disciplinary proceedings against a judge should provide him "with the right to challenge the decision and sanction".[15] This has to be viewed as substantial enlargement of the requirement because the provision refers to the scope of appeal review, pointing now that it should extend to the discretionary power of the primary decision-maker in choosing the appropriate measure of liability.

The European Commission for Democracy through Law (Venice Commission) – the advisory body of the Council of Europe – also considers that the right of appeal to a court of law has to be provided in proper way, underlining the importance of that right to all judges, including the disciplinary systems with independent judicial councils.[16]

In the light of these recommendations developed on the international level, it appears that the right of appeal in disciplinary cases against judges is recognized, even though no uniform and unanimous position has been expressed as regards the systems where the highest judicial authority takes a disciplinary decision against a judge. Besides, those recommendations do not suggest the exact scope and standard of review once appeal is submitted. Accordingly, these unsettled issues merit theoretical reflections.

13 Consultative Council of European Judges, *Opinion No. 3 (2002)*, § 72.

14 Consultative Council of European Judges, *Opinion No. 10 (2007), to the Attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the Service of Society*, Strasbourg, 21-23 November 2007, § 39, available at: https://rm.coe.int/168074779b (last accessed 16 January 2019).

15 Committee of Ministers of the Council of Europe, *Recommendation CM/Rec(2010)12*, § 69.

16 Venice Commission, *Opinion on the Draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina*, No. 712/2013 (CDL-AD(2014)008), Strasbourg, 24 March 2014, § 110, available at: www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)008-e (last accessed 16 January 2019); *Opinion on the Draft Law on Judges and Prosecutors of Turkey*, No. 610/2011 (CDL-AD(2011)004), Strasbourg, 29 March 2011, § 76, available at: www.europarl.europa.eu/meetdocs/2009_2014/documents/d-tr/dv/1128_17_/1128_17_en.pdf (last accessed 16 January 2019).

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When approaching the question about the scope and standard of appeal review that must be applied in the disciplinary case against a judge, the principal issue is that of balance between the primary decision-maker and the reviewing authority. On the one hand, granting too little reviewing powers might make the right of appeal ineffective, illusory, and even pointless. On the other hand, too wide powers of the reviewing court might diminish the role of the primary decision-making authority, be it a classic court or a specially designed council for the judiciary. The latter body becomes more usual for European domestic orders, which entrust the judicial councils, often by way of domestic constitutions, with the functions of establishing facts, applying law to the individual facts, and contemplating appropriate sanction. If extensive review becomes an examination *de novo* with the possibility of discarding every factual and legal findings of council for the judiciary, there might be little practical reason in investing resources for the development of such councils.

3. The European Experience

Today, many European countries provide a variety of appeal procedures against the decision made by the initial disciplinary body. According to research of the European Network of Councils for the Judiciary, an appeal or review of the final decision adopted by the disciplinary body is available across Europe, except in those jurisdictions where the decision of the disciplinary procedure is made by the relevant Supreme Court (such as in the Czech Republic and the Netherlands). In common law jurisdictions where, as a general rule, an 'appeal' is not directly available, the possibility of 'judicial review' remains open (for instance, in England and Wales, Northern Ireland and Ireland). Where available, appeal procedures are adjudicated by disciplinary appellate panels or courts (such as in Belgium, Hungary, Slovakia or Slovenia), by administrative courts, including the relevant supreme administrative court or the council of state (in Albania, Belgium, Bulgaria, France, Serbia, Spain and Turkey) or by the supreme or constitutional court of the country (for instance, in Austria, Croatia, Denmark, Italy, Lithuania, Poland, Portugal and Romania).[17]

In France, the disciplinary decisions taken by the Superior Council of the Judiciary *(Conseil Superieur de la Magistrature)*, taken either in relation to the judges or the prosecutors, are open to review by the Council of State. However, certain authors point out that the scope of the review differs greatly. With regard to the decisions applicable to judges, the Council of State provides the *cassation review*, meaning that the review will cover the formal legality of the decision (competence and procedure) and its substantive legality, limited however to the legal characterization of facts. With regard to the prosecutors, on the other hand, the Council of State is acting as *judge of abuse of power* meaning that, in addition to the review described above, it will also make sure that the sanction inflicted is not clearly disproportionate to the offence. Furthermore, the Council of State has

17 European Network of Councils for the Judiciary, 2015, p. 39.

gradually expanded the scope of the review of disciplinary decisions against State prosecutors, which only enhanced the discrepancy between the levels of protection for the two kinds of magistrates.[18]

4. The U.S. Experience

It is a general approach in the states of the United States that the disciplinary decisions of judicial conduct commissions are open to judicial review. The court reviews the commission's findings of fact to see if they are supported by the evidence. The court also reviews the commission's conclusions of law and determines whether its sanction decision or recommendation is justified. The court may adopt the commission's findings, conclusions and sanction; may reject them; may adopt some and reject others or may adopt the findings of fact and conclusions of law but impose a different sanction.[19] So, while the scope of review may extend to facts, law and discretion, there is no uniform practice as to the *depth* of the review that should be provided by the court. In other words, the courts apply different standards of review.

For example, the Supreme Court of Kentucky established the standard of review as follows:

> Section 121 of the Kentucky Constitution authorizes the commission to remove a judge for good cause and designates the Supreme Court as the forum for judicial review. For the commission to sanction a judge, the charges must be supported by "clear and convincing" evidence. ... *We must accept the findings and conclusions of the commission "unless they are clearly erroneous" or "unreasonable"* (emphasis added).[20]

In Oklahoma, the following standard of review is applied:

> (c) The review in the Appellate Division shall be an equity appeal, as to both law and fact. The Appellate Division may affirm, modify or reverse the judgment of the Trial Division, or enter a new judgment, as justice may require. ...
>
> ... In cases of equitable cognizance, a judgment will be sustained on appeal *unless it is found to be against the clear weight of the evidence or contrary to law or established principles of equity*...(emphasis added).[21]

In setting such standards of review, the reviewing courts have regard to the special role of the judicial conduct commissions and apparently give certain amount

18 A. Garapon & H. Epineuse, 'Judicial Independence in France', *in* A. Seibert-Fohr (Ed.), *Judicial Independence in Transition,* Heidelberg - New York, Springer, 2012, p. 292.

19 C. Gray, *A Study of State Judicial Discipline Sanctions*, Chicago, American Judicature Society, 2002, p. 5.

20 Supreme Court of Kentucky, *Alred v. Commonwealth Judicial Conduct Commission*, 23 July 2012.

21 Court on the Judiciary of Oklahoma, Appellate Division, *State Edmondson v. Colclazier,* No. CJAD-01-2, 14 June 2002.

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of deference to their findings of fact and law and the use of discretion. This deference itself is referred to differently. For example, in Arizona the proceedings are conducted *de novo,* but the reviewing court will "ordinarily give great deference to the Commission's recommendations".[22] Similarly, the recommendations of judicial conduct commission in Texas are given "great deference when based on legally and factually sufficient evidence".[23] While in Nebraska, the "recommendation is entitled to be given weight".[24]

In comparison with deference given to administrative agencies, the Connecticut Supreme Court followed less deferential treatment of judicial conduct commission's findings. The idea behind less deferential treatment was to put more weight on the protection of the judicial profession from the unfounded disciplinary charges. The court reasoned as follows:

> [O]ur review is not *de novo*. We cannot assess the credibility of witnesses.... Nonetheless, our review must take into account the risk that unfounded charges of judicial misconduct will impair society's interest in an independent judiciary. We must therefore depart from our normal rule of deference to fact-finding by trial courts and administrative agencies. We have a non-delegable responsibility, upon an appeal, to undertake a scrupulous and searching examination of the record to ascertain whether there was substantial evidence to support the council's factual findings.[25]

As pointed out by the Supreme Court of Utah in the case mentioned below, a majority of state supreme courts use "even-less-deferential standard of review": the supreme court reviews the findings and recommendations of a judicial disciplinary panel under a standard of *de novo* on the record. This term describes a standard of review first adopted by the California Supreme Court under which the initial tribunal's findings of fact, as well as its conclusions of law and recommendations, are reviewed without any deference.

This virtually 'zero level' of deference was however slightly increased in Utah as regards the factual findings of the judicial misconduct commission. Having examined its vast review powers as provided by the Constitution, the Supreme Court of Utah stated as follows:

> [We] ... choose not to adopt the even-less-deferential standard of review that a majority of states appear to use when the supreme court reviews the findings and recommendations of a judicial disciplinary panel under a standard of "*de novo* on the record." ... [S]uch a standard seems to demean the role of the Commission in the judicial discipline process and is inconsistent with the institutional capabilities of an appellate court. Long history has taught the

22 Supreme Court of Arizona, *In re Peck*, 867 P.2d 853, 860 (1994).

23 Special Court of Review Appointed by the Texas Supreme Court, *In re Barr*, 13 S.W.3d 525, 560 (1998).

24 Supreme Court of Nebraska, *In re Empson*, 9 May 1997.

25 Supreme Court of Connecticut, *In re Zoarski*, 632 A.2d 1114 (Conn. 1993).

judiciary that the forum which hears conflicting evidence has a superior capability to resolve factual questions, particularly where witness demeanor is concerned. ... There is no reason to ignore that teaching only when dealing with judicial discipline. Moreover, it can be argued that the political function of a judicial conduct commission — to lend neutral credibility to the handling of allegations of misconduct against judges while assuring that judges are subjected to effective and measured discipline, where necessary — requires that the Commission's actions be reviewed by a court with some deference. The members of this court are, after all, judges too.

In sum, we will not overturn the Commission's findings of fact unless they are arbitrary, capricious, or plainly in error, but we reserve the right to draw inferences from the basic facts which may differ from the Commission's inferences and grant no deference to the Commission's ultimate decision as to what constitutes an appropriate sanction. This standard of review will provide the necessary flexibility to address the concerns of those courts that employ a less-deferential standard of review in judicial misconduct proceedings – *viz.,* (i) providing a check on an errant commission, and (ii) discharging the court's ultimate responsibility of imposing an appropriate sanction without demeaning the Commission's role in the judicial discipline process.[26]

5. Projecting an Optimal Model for the Right of Appeal in Judicial Disciplinary Proceedings

5.1. Delimiting the Conceptual Framework

The above overview of the European and U.S. practice suggests that, while the right of appeal in case of judicial discipline is usually provided for in domestic jurisdictions, there remains variety of approaches as regards the scope and standard of appeal review that are applied in the disciplinary case against a judge. Apparently, given the diversity of the disciplinary systems, there may not be a unique solution for various domestic legal orders. Particular difficulties in determining a proper level of review arise when the first-instance proceedings are entrusted to the judicial council, which is not a classic court in the system of the judiciary. Therefore, it is important to identify the main factors that determine the choice for the scope and intensity of appeal review in each particular setting.

First of all, any system of the appeal review must be assessed as regards the three main areas: review of *law, fact and discretion*. These three concepts are central to determine the scope of appeal review. In other words, the relationship that does and should prevail between the reviewing court and the initial decision-maker in relation to law, fact and discretion determines the basic features of the appeal review and discussion as to the appeal review will normally be based on the analysis of the matter in the light of those three basic concepts.[27]

26 Utah Supreme Court, *In Re Worthen*, 926 P.2d 853 (Utah 1996).

27 P. Craig, *EU Administrative Law*, Oxford, Oxford University Press, 2006, p. 481.

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Secondly, the functional interaction of the reviewing court with the primary decision-maker should be determined by a *specific standard of review* (in other words, the depth of review) exercised by the reviewing court in those three categories (law, fact and discretion). In the U.S. jurisprudence, this problem is also discussed under the label of 'deference' that should be given to primary decision-making authority, and has normally arisen in the context of judicial deference to administrative agencies.[28]

There have been developed several rationales for judicial deference. The first one is expertise: the specialized bodies that possess experience and expertise in a given area may be in a better position than the court to decide issues in a manner consistent with, and in furtherance of, the policy underlying enabling legislation. The second reason is the separation of power and respecting checks and balances in the system of government. The third reason suggests that the primary decision-maker is a delegate empowered by legislature to articulate and implement public goals declared by the legislator in the statute. The fourth reason, closely connected with the previous one, is that the primary decision-maker is also delegated the primary interpretative authority by legislature. There are further reasons, including a greater accountability, as well as responsiveness to quickly changing social circumstances.[29]

To illustrate the difference in standards of review, it might be useful to give some examples. As regards the interpretation of law, in civil-law countries the standard of review of legal issues is usually based on the correctness test, which means that the courts simply substitute judgment of the specialized agencies on the questions of law if they consider it represents a wrong interpretation of law,[30] while in the U.S. system, under a very brief overview, there is a two-step test for deference of statute construction, as developed by the U.S. Supreme Court in the case of *Chevron*.[31] Step one is whether Congress has directly addressed the precise issue in the statute. If legislative intent is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. Step two is what to do if the statute is silent or ambiguous. If Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. This theory has received further development, precision and was subject to debate.[32] What is important to underline here is that once the court finds that

28 A. Scalia, 'Judicial Deference to Administrative Interpretations of Law', *Duke Law Journal*, No. 3, 1989, pp. 511-521; G. Martin & D. Super, 'Judicial Deference to Administrative Agencies and Its Limits', *Clearinghouse Review Journal of Poverty Law and Policy*, March-April 2007, pp. 596-609.

29 For more details, *see* M. Bernatt, 'Transatlantic Perspective on Judicial Deference in Administrative Law', *Columbia Journal of European Law*, No. 22, 2016, pp. 280-283.

30 Craig, 2006, p. 436.

31 US Supreme Court, *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 476 U.S. 837(1984).

32 A. Shissias, 'A Question of Deference', *South Carolina Lawyer*, No. 27, 2015, pp. 48-53.

the statute interpretation was permissible, it should uphold that interpretation even though the reviewing court itself would prefer another interpretation.

As regards the facts, the standard of review may refer to 'manifest error'[33] or the lack of 'substantial evidence' as interpreted in the U.S. case-law.[34] As regards the use of discretion, the standard of review could be manifest error, misuse of power or some other clear excess in the bounds of discretion, the formula used in the EU jurisprudence.[35]

Thirdly, the adequacy of appeal review must be assessed in the capacity of the reviewing court to take appropriate *remedial action* to ensure adequate redress in relation to the violations found at the stage of primary decision-making.

5.2. The Relevant Case-Law of the ECHR

The issue of judicial review has been a matter of discussion in the ECHR in those cases where the applicants complained about violations of rights in the proceedings before the specialized agencies or tribunals dealing with their cases as first-instance decision-makers. The ECHR adopted the following approach:

> [E]ven where an adjudicatory body determining disputes over "civil rights and obligations" does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are subject to subsequent control by a judicial body that has "full jurisdiction" and does provide the guarantees of Article 6 § 1.[36]

Subsequently, the ECHR explained that the requirement that a court or tribunal should have 'full jurisdiction' will be satisfied where it is found that the judicial body in question has exercised 'sufficient jurisdiction' or provided 'sufficient review' in the proceedings before it.[37]

In adopting this approach, the ECHR has had regard to the fact that in reviewing the decisions of the specialized authorities, it is often the case that the scope of judicial review is limited and that it is the nature of review proceedings that the controlling authority reviews the previous proceedings rather than taking new decisions. Accordingly, it is not the role of the Convention to give access to a level of jurisdiction that can substitute its opinion for that of the specialized authorities. In this regard, particular emphasis has been placed on the respect, which must be accorded to decisions taken by the administrative authorities on grounds of 'expediency' and which often involve specialized areas of law.[38] Therefore, in the case of *Bryan v. the United Kingdom*, the ECHR postulated that in assessing the sufficiency of a judicial review, it is necessary to have regard to the powers of the judicial body in question provided by domestic law (e.g., scope of jurisdiction on facts and law, ability to repeal and change a decision or enter a

33 Craig, 2006, p. 467.
34 Bernatt, 2016, p. 287.
35 Craig, 2006, p. 441.
36 *Albert and Le Compte v. Belgium*, 10 February 1983, § 29, Series A No. 58.
37 *Zumtobel v. Austria*, 21 September 1993, §§ 31-32, Series A No. 268-A.
38 *Fazia Ali v. the United Kingdom*, No. 40378/10, § 77, 20 October 2015.

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new decision), and to such factors as (a) the subject-matter of the decision appealed against, in particular, whether it concerned a specialized issue requiring professional knowledge or experience and whether it involved the exercise of discretion and, if so, to what extent; (b) the manner in which that decision was arrived at, in particular, the procedural guarantees available in the proceedings before the adjudicatory body, and (c) the content of the dispute, including the desired and actual grounds of appeal.[39]

In a recent case concerning disciplinary proceedings against a judge, the ECHR confirmed the above principles on judicial review and additionally emphasized the importance of the appellate authority to provide review that would be 'appropriate' to the subject-matter of the dispute.[40] The ECHR then found in the specific circumstances of that case that, in order to clarify certain facts, it was necessary for the reviewing court "to perform a review that was sufficiently thorough".[41] In a separate opinion to the judgment, a substantial group of judges suggested that there may remain uncertainty in translating these procedural requirements into particular domestic settings where appellate authority should determine the level of review that has to be ensured in a disciplinary case against a judge.

5.3. Scope and Standard of Appeal Review in Judicial Discipline Cases

In the light of the above considerations, the question should be examined from the standpoint of what is 'sufficient' appeal review in disciplinary proceedings against a judge. Despite the diversity of judicial discipline systems, it appears that the scope of appeal review should *always extend to the questions of law (substantive and procedural), fact and discretion*. This follows from the abovementioned recommendations made on the international level and from the case-law of the ECHR discussed in this article. Notably, where the domestic court could review only the legal issues of dismissal case and do it in a in a very limited way (whether the impugned decision was "compatible with the object and purpose of the law") and it could not review the factual issues, this led the ECHR to conclude that that jurisdiction was insufficient.[42] Where the reviewing court could not examine the proportionality of the penalty in the disciplinary proceedings in which the right to continue to practise medicine as a private practitioner was at stake, this controlling judicial authority (the Council of State) was also considered as having insufficient reviewing powers.[43]

Accordingly, what remains fluctuating is the actual depth of review or, more precisely, the standards of review for each of those categories and the corresponding amount of deference that should be given to the primary decision-maker. It may well be justified that the review of facts should be facial or, on the contrary, very profound. The same flexibility may exist in relation to the review

39 *Bryan v. the United Kingdom*, 22 November 1995, §§ 44-47.

40 *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], Nos. 55391/13 and 2 others, § 196, 6 November 2018.

41 *Ibid.*, § 206.

42 *Obermeier v. Austria*, 28 June 1990, § 70, Series A No. 179.

43 *Diennet v. France*, 26 September 1995, § 34, Series A No. 325-A.

of legal assessments by the first-instance authority and as regards the use of discretionary power. This scale of standards is determined by several factors that have been discussed in legal literature devoted to judicial deference in reviewing administrative decisions. Those factors include due process guarantees in first-instance administrative proceedings, institutionally granted impartiality of administrative authorities, established expertise possessed by administrative authority.[44] As will be shown below, those theoretical premises have relevance for the area of judicial review of decisions taken in cases on judicial discipline.

5.4. Factors Determining the Standard of Appeal Review in Judicial Discipline Cases

5.4.1. Institutional Factor

This is a general factor that includes a consideration of the status of the body in domestic law. Notably, with regards to the councils for the judiciary, it is relevant to inquire whether the particular council respects the principle of separation of powers and contributes to the proper checks and balances in the governmental system, whether the body is provided with sufficient structural guarantees of independence and impartiality or whether it has been specifically designated by Parliament as having inherent power of statutory interpretation.

The more structural issues arise, the more intensive appeal review should be. For example, where the council for the judiciary was heavily staffed with the representatives of the executive and prosecutorial authorities (who had different status than the judges) and the judicial corps was represented in a tiny minority, the ECHR found that this was a serious indication of the lack of structural independence and impartiality in the proceedings before such a body.[45] This conclusion implied that the intensity of posterior judicial review of the findings of law and fact and the use of discretion by the primary decision-maker had to be high.

5.4.2. Procedural Factor

It is important to inquire into the nature of the proceedings and see if there are more accusatorial or adversarial features prevailing in the procedure, if the due process rights and safeguards are available, including the right to a full hearing and defence for the judge, what are the applicable standards of proof. Less those procedural guarantees are present, more intensive appeal review should be.

The bifurcation of accusatorial and adjudicative functions is an important aspect of the fairness of the proceedings. The ECHR has found it problematic where the members of the judicial council carried out preliminary inquiries, submitted requests for dismissal of a judge and subsequently took part in the decisions to remove the judge from office. This duplication of functions provided the disciplinary proceedings with more inquisitorial features that compromised the procedural fairness.[46]

44 Bernatt, 2016, p. 325.
45 *Oleksandr Volkov v. Ukraine*, §§ 110-114.
46 *Oleksandr Volkov v. Ukraine,* § 115.

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The ECHR further examined this procedural aspect in the case of *Mitrinovski v. "the former Yugoslav Republic of Macedonia"* in which the applicant was dismissed by the national judicial council. Judge J.V., who was the President of the Supreme Court at the time and, in addition, an *ex officio* member of the judicial council, had requested the initiation of the dismissal proceedings against the applicant (the judge at the Court of Appeal) on the grounds that previously the Supreme Court, including Judge J.V., had suggested that there had been professional misconduct by the applicant. The *ad hoc* commission of the judicial council then conducted the hearing where Judge J.V. was able to submit evidence and arguments in support of the allegations against the applicant and had thus acted as a 'prosecutor'. The same Judge J.V. then sat as an *ex officio* member of the plenary of the judicial council that, following the *ad hoc* commission's recommendation, decided to remove the applicant from office. In these circumstances, the ECHR considered that the system in which Judge J.V., as a member of the judicial council who had sought the impugned proceedings and subsequently taken part in the decision to remove the applicant from office, cast objective doubt on his impartiality when deciding on the merits of the applicant's case.[47]

In another case against Georgia, the ECHR found that four members of the disciplinary council of judges had first gathered as a panel to examine, in the capacity of a judicial body of first instance, the merits of the disciplinary charge brought against the applicant. The panel conducted a hearing, examined all the evidence and then delivered a reasoned decision finding the applicant guilty of a disciplinary offence and punishing him with dismissal. There was a possibility of internal appeal within the disciplinary council, which ensured entire revision of issues of fact, law and the use of discretion. However, this internal appeal could not count as a proper guarantee since the same four judges were part of the eight-member plenary session of the disciplinary council. In other words, on that internal appeal, the same four judges were called upon to reconsider their own decision in the same case in its entirety, to review whether they themselves had committed any error in their assessment of the facts or of legal interpretation. The eight-member plenary of the Disciplinary Council took appellate decisions by a simple majority, with its President possessing the casting vote in the event of a tie. That meant that half of the bench, including its President, had been previously involved in examining the case at first instance. So in the final output, the judicial council did not ensure a proper distribution of internal functions affecting the impartiality of the proceedings. This implied that the scope of external judicial review that was available before the Supreme Court had to be extended. However, the Supreme Court's review of the disciplinary proceedings was clearly limited to the assessment of the questions of law, which was insufficient for the ECHR.[48]

47 *Mitrinovski v. the former Yugoslav Republic of Macedonia*, No. 6899/12, 30 April 2015.
48 *Sturua v. Georgia*, No. 45729/05, 28 March 2017.

5.4.3. Expertise Factor

This factor refers to the expertise, knowledge and experience that the specialist bodies possess and to the fact that the legislator establishing the specialist body implicitly or explicitly recognizes that that authority has the primary role in interpreting and applying law in the specialist area. There is no doubt that the specialist knowledge and experience possessed by various administrative agencies (e.g., town planning, telecommunication, competition authorities) will require showing respect or deference in reviewing the findings of such agencies by the courts. However, analogy between the administrative agencies and the judicial councils should be drawn very carefully. It should be borne in mind that in the area of judicial discipline, the reviewing court itself is staffed with professional judges who are well aware of judicial ethics standards of professional conduct. Therefore, in the judicial discipline cases, in view of the subject-matter of the expertise, the reviewing court may claim more legitimacy in having a closer look at the decisions of the judicial councils as compared to the decisions of other specialized agencies subject to judicial review. Nevertheless, the duration of the adjudicating practice of the judicial council and the consistency of such practice plays a role. Notably, where the substantial knowledge and experience has been accumulated by the long-standing and consistent case-law of the judicial council, greater deference should be given to that authority.

Accordingly, the above factors will affect the standard of appeal review. These factors should be analysed cumulatively. Where all these factors indicate the necessity to defer to the primary decision-maker, the minimum standards of review should be set. In that event, it appears appropriate to assume that the manifest error should be the minimum standard of review in relation to each of three areas of review: in the assessment of facts, in the interpretation and application of law (both substantive and procedural) and in the use of discretion by the primary decision-maker. On the opposite side of the sliding scale is the setting in which the institutional, procedural and expertise factors call for a deep review. In the extreme case the maximum standards of review in respect of factual, legal and discretional issues may necessitate even the full re-examination of the matter with an entire re-hearing of the case, the admission of new evidence and reassessment of the legal and discretionary findings. The standards of review would be the correctness test where the reviewing court substitutes its own judgment for that of the primary decision-maker.

5.5. Remedial Capacity of the Appellate Jurisdiction

The appellate court should be able to effectively deal with the identified shortcomings in the first-instance proceedings. The minimum power is to be able to quash the impugned decision rendering it legally invalid. This however may not be sufficient as substantial detrimental consequences of the initial decision may not be removed in that simple manner. For effective protection of the rights, it might be important that the reviewing court has the power of suspending the enforcement of the impugned decision, the power of ordering remittal of the case to the particular authority or issuing other specific performance, the right of entering a new judgement on the merits, and so on. This remedial capacity should

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be established in the light of the above criteria (institutional, procedural and expertise factors) determining the relationship between the primary decision-maker and the reviewing court.

In *Kingsley v. the United Kingdom*, the ECHR considered that the administrative authority conducting the proceedings had not presented the necessary appearance of impartiality. The ECHR found that it was important that the reviewing court not only considered the complaint but also had the ability to quash the impugned decision and to remit the case for a new decision by an impartial body. This was not available in that case, however.[49]

In another case, the ECHR found that the reviewing court had been vested with powers to declare the decision on dismissal of a judge unlawful without being able to quash that decision and take any further steps (e.g., order for remittal). There was no automatic re-instatement in the post of judge exclusively on the basis of such declaratory decision. In sum, the remedial power was insufficient to conclude that the review was appropriate.[50]

6. Conclusions

The international texts in the area of judicial discipline recommend that the disciplinary decision should be open to appeal. However, no specific indications have been made regarding the scope and standards of appeal review. Nevertheless, it is important to know when judicial review of a disciplinary decision is sufficient so that the right of appeal is an effective one and not illusory or purely theoretical. To ensure effectiveness of the right of appeal against disciplinary decisions, the scope of appeal review should always extend to the questions of law (substantive and procedural), fact and discretion. What remains fluctuating is the actual depth of review or, more precisely, the standards of review for each of those categories and the corresponding amount of deference that should be given to the primary decision-maker. Taking into account the diversity of the domestic judicial discipline systems, it is not possible to develop a uniform standard of review applicable in various domestic legal orders. Meanwhile, the choice of appropriate standard of review should be made with reference to certain criteria that characterize the relationship between the primary decision-maker and the reviewing authority.

In that regard, the following factors have been identified to determine the standard of appeal review in judicial discipline cases: (a) institutional factor (it is necessary to examine the status of that authority, including the availability of structural guarantees of independence and impartiality; the more structural issues arise, the more intensive appeal review should be); (b) procedural factor (it is necessary to look into the nature of the proceedings and check if there are more accusatorial or adversarial features prevailing in the procedure, if the due process rights and safeguards are available; less those procedural guarantees are present,

49 *Kingsley v. the United Kingdom* [GC], No. 35605/97, § 32, ECHR 2002-IV.
50 *Oleksandr Volkov v. Ukraine*, §§ 125-126.

more intensive appeal review should be); (c) expertise factor (it is important to check the availability of the specialist knowledge and experience that the primary decision-maker may possess, the role of that body in interpreting and applying law in the specialist area; thus, with regard to the judicial discipline council, the duration and consistency of its adjudicating practice should be taken into account; where the substantial knowledge and experience has been accumulated by the long-standing and consistent case-law of the judicial council, greater deference should be given to that authority).

The appellate review should further be provided with appropriate *remedial capacity*. The appellate court should be able to effectively deal with the identified shortcomings. The minimum power is to be able to quash the impugned decision. This, however, may not be sufficient as substantial damage of the initial decision may not be removed in that simple manner. For effective protection of the rights, it might be important that the reviewing court has the power of suspending the enforcement of the impugned decision, the power of ordering remittal of the case to the particular authority or issuing other specific performance, the right of entering a new judgement on the merits, and so on. This remedial capacity should be established in the light of the above criteria (institutional, procedural and expertise), determining the relationship between the primary decision-maker and the reviewing court.

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