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## **Evolution of the Models of Disciplinary Procedures in the Light of the Conventional and Constitutional Standards of the Right to a Trial<sup>1</sup>**

**Abstract:** The article focuses on the evolution of one of the most vital elements of disciplinary proceedings, i.e. judicial control (audit) of disciplinary decisions. Regarding this issue, the article discusses jurisprudence of the European Court of Human Rights and the Polish Constitutional Tribunal. The presented historical and functional analysis of model disciplinary proceedings across many different professions distinguishes basic restrictions of the right to a trial and their character in disciplinary proceedings. With reference to appealing against decisions of disciplinary bodies, the article emphasizes that the lines between civil and penal procedures are blurred. Finally, the article addresses the influence of amendments made in the Polish penal procedure and the Act on Prosecution between 2015 and 2016 on the application of disciplinary proceedings.

**Keywords:** models, disciplinary proceedings, judicial control, Supreme Court, ECHR

### **1. Introduction**

Basis elements of disciplinary proceedings may encompass:

1) functions fulfilled by these proceedings<sup>2</sup>: repressive, protective and integrative;

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- 1 This article was written within the framework of the project under the title: „Czy polski model postępowania odwoławczego w sprawach karnych jest rzetelny?” (Is the Polish model of the the appeal proceedings in criminal matters reliable?) (programme „OPUS 8”) founded by the National Scientific Centere, according to the the agreement no. UMO-2014/15/B/HS5/02689.
  - 2 P. Skuczyński, Aktualne problemy odpowiedzialności dyscyplinarnej w zawodach prawniczych, (in:) A. Bodnar, P. Kubaszewski (eds.), Postępowania dyscyplinarne w zawodach prawniczych. Model ustrojowy i praktyka, Warszawa 2013, pp. 65-67

- 2) substantive bases of disciplinary liability<sup>3</sup>;
- 3) investigative bodies and procedures applied by them (in particular the scope of provisions of the Code of Criminal Procedure applied therein);
- 4) judicial review (control) of disciplinary tribunals' rulings.

In the light of the subject literature, it is undeniable that disciplinary law is strictly connected with criminal law (sometimes with administrative law too); it may also be classified as a widely understood repressive law<sup>4</sup>. Nevertheless, what differs disciplinary law from criminal law are the sanctions applied therein and a lack of common binding force since it solely refers to specific professions. The Constitutional Tribunal's case law underlines that this function provides corporation members with due freedom and independence in the practice of their profession. The Tribunal also discerned in its case law a distinct role of courts in disciplinary cases against professionals enjoying public trust and in cases on disciplinary liability of other professions. Insofar as judicial review (control) of disciplinary tribunals' rulings guarantees the protection of constitutional rights and freedoms of the punished persons in the latter case, in the previous one it fulfils two equal functions. On the one hand, it provides members of Professional Associations with indispensable freedom and independence to practice profession, while on the other hand, it is an instrument of State supervision over Professional Associations<sup>5</sup>.

It appears that contrary to criminal law, disciplinary law cannot be attributed with a compensatory function. As a rule, victims may take part in disciplinary procedures and yet they do not envisage any form of satisfaction of civil claims of a victim harmed in effect of a disciplinary tort.

It is worth indicating that disciplinary liability in all professional groups is universally based on the violation of professional ethics and dignity. With regard to disciplinary proceedings against prosecutors, we should pay attention to the Supreme Court's ruling concerning infringed dignity of the office of a prosecutor (who was reading a book in a courtroom during the Defence Counsel's speech) as a ground of disciplinary liability: "Dignity of the office of a prosecutor should be understood as a certain standard of conduct in various official and unofficial situations, the standard

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3 P. Skuczyński, Aktualne problemy odpowiedzialności dyscyplinarnej w zawodach prawniczych, pp. 60-64.

4 K. Dudka, Stosowanie przepisów k.p.k. w postępowaniu dyscyplinarnym w stosunku do nauczycieli akademickich (in:) P. Hofmański (ed.), Węzłowe problemy procesu karnego, Warszawa 2010, pp. 354-355. See also the Judgment of the Supreme Court of 23 September 2016, SDI 44/16, <http://www.sn.pl/orzecznictwo> (accessed: 23 November 2017).

5 See the judgment of the Constitutional Tribunal of 8 December 1998., K 41/97, OTK 1998, No. 7, item 117.

establishing stricter requirements towards prosecutors so that they are role models for other officials”<sup>6</sup>.

As far as the grounds of judges’ disciplinary liability are concerned, we should pay attention to the interesting judgment of the Supreme Court on the limits of judicial independence, according to which “(...) constitutionally enshrined judicial independence is not of an absolute nature insofar as it permits every and any legal interpretation and its application by the judge. If such understood independence was assumed, it would generate a system of absolute arbitrariness of sentencing, void of a sense of stability and certainty of law or predictability of court actions, in extreme situations leading to anarchy. The judge’s right to his or her own independent interpretation of legal provisions does not vest in them a competence to shape their content freely; it does not exempt them from a reflection when their interpretation differs from the uniform interpretation made by the Supreme Court or Appellate Court (...)”<sup>7</sup>.

This study will mainly focus on the evolution of the right of the accused to appeal against Disciplinary Tribunals’ rulings to common courts or the Supreme Court as a guarantee of procedural and substantive justice.

## **2. A conventional standard of judicial review (control) of disciplinary proceedings**

Article 6 par. 1 of the European Convention on Human Rights is of fundamental importance in defining a conventional standard of the right to a trial; it sets forth in the first sentence that: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

As far as the constitutional standard of disciplinary procedures’ assessment of reliability is concerned, it is generally found in Art. 45 par. 1 of the Constitution, according to which every citizen shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.

The ECHR’s case law ensues a general conclusion according to which sentencing in disciplinary cases by authorities (bodies) not satisfying a requirement of an “independent and impartial court” does not violate the conventional standard<sup>8</sup>.

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6 The decision of the Supreme Court of 27 July 2016, SDI 6/16, <http://www.sn.pl/orzecznictwo> (accessed: 23 November 2016).

7 The judgment of the Supreme Court of 16 June 2016, SNO 21/16, Lex No. 2064239.

8 So in the case of disciplinary courts; *Le Compte, Van Leven and De Meyere v. Belgium* of 3 June 1981, applications No. 6878/75; 7238/75); *Frankowicz v. Poland* of 16 December 2008 (application No. 53025/99) and in the judgment of 18 October 2011 r. in the case of *Sosinowska v. Poland*

An interesting example here is, e.g., the ECHR's judgment of 27 January 2004 in the case of *Kyprianou vs. Cyprus* (Application No. 73797), where the Court decided there was no impartiality of the first-instance court which sentenced the applicant to imprisonment for contempt of court. The Court considered that such a penalty was disproportionately severe on the applicant and was capable of having a "chilling effect" on the performance of lawyers' duties as defence counsel. The same conclusion was reached by the Grand Chamber of ECHR in the judgment of 15 December 2005 in the same case, yet it was more focused on the fact that the Supreme Court failed to reverse the lower court's judgment even though it had the power to do so. The Supreme Court did not remedy the defect in question (lack of impartiality) in the appeal because the Court did not re-examine the case.

### **3. A constitutional standard of judicial review (control) of disciplinary proceedings**

Pursuant to well-established Constitutional Tribunal's case law, the activities of the bodies (authorities) established to resolve legal disputes other than State courts, including disciplinary tribunals formed within corporate organizational structures, are admissible within the binding legal order. Under Art. 45 par. 1 of the Constitution, the Constitutional Tribunal repeatedly ruled, e.g. in the judgment of 11 September 2001<sup>9</sup>, that judicial review (control) of disciplinary proceedings' decisions guarantees respect of the rights and freedoms of the accused. "In all proceedings of a repressive nature the right to a fair trial fulfils a special role assuring control over respect of civil rights and freedoms by an independent, impartial and sovereign court"<sup>10</sup>. Emphasizing that the court's control must be limited by its very nature because it does not involve resolving cases "from the very beginning", the Tribunal also stressed the actuality (reality) and efficiency of the right to a fair trial in disciplinary proceedings and noticed that: "(...) the right to a fair trial is satisfied under such regulations which assure judicial control of a ruling, decision or other individual act determining a legal situation of the subject – by initiating proceedings before a common court or administrative court"<sup>11</sup>.

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(application No. 10247/09). See the analysis of this judgment (in:) A. Bodnar, *Postępowania dyscyplinarne w wolnych zawodach prawniczych w kontekście orzecznictwa ETPC* (in:) *Postępowania dyscyplinarne w zawodach prawniczych*, pp. 23-24.

9 SK 17/2000, *Journal of Laws* of 2001, item 1129.

10 See the judgment of the Constitutional Tribunal of 19 May 2003, K. 39/2003 r., OTK-A 2005, No. 3, item 27 and the case-law cited there.

11 The judgment of the Constitutional Tribunal of 4 March 2008, SK 3/07, OTK-A 2008, No. 2, item 25; see also the judgment of the Constitutional Tribunal of 17 November 2009, SK 64/08, Lex, OTK-A 2009, No. 10, item 148.

Concurrently, the Constitutional Tribunal noticed that in the Polish legal system disciplinary liability concerns many professions and yet it does not envisage any uniform procedure to be applied in order to establish this liability for all professions, including legal ones<sup>12</sup>.

#### **4. Evolution of the models of disciplinary procedures in the context of the right to a trial**

Carrying out a historical and functional analysis of disciplinary procedures in different professional corporations, it may be generally claimed that basic limitations of the right to a trial were of the following nature: 1) subjective (a limited group of entities entitled to appeal against disciplinary tribunal's decisions to a court); 2) objective (limited types of matters subject to appeal to a court) – non-binding or binding decisions; 3) a type of appeal measures and the ensuing scope of cognition of an appellate court hearing them. All these restrictions forming different configurations were subject to gradual evolution that was strictly correlated with the changes of the common criminal procedure and the need to adapt disciplinary procedures to the Constitution of 1997. Comparing the above comments related to legal professions, it is worth considering the Act on Advocates of 26 May 1982 (hereinafter referred to as the AA)<sup>13</sup>, which originally granted the right to an extraordinary appeal against a binding decision of disciplinary tribunals solely to special entities (Minister of Justice, Prosecutor and President of the National Bar Council – Art. 91 par. 1 of the AA). The Act on Legal Advisors of 6 July 1982<sup>14</sup> originally envisaged objective limitations in Art. 65 par. 3 too. Pursuant to it, the punished person may appeal to the Supreme Court solely against a disciplinary decision suspending or depriving him or her of the right to practice a profession (but not against a caution). Furthermore, the Act on Prosecutors of 20 June 1985 originally<sup>15</sup> did not envisage judicial control of decisions issued in disciplinary proceedings.

Models of judicial control of disciplinary proceedings in these corporations were made uniform by the regulations of respective Acts of 2000 by the introduction of

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12 The judgement of the Constitutional Tribunal of 25 June 2012, K. 9/2010, OTK ZU 2012/6A, item 66.

13 The Act of 26 May 1982 – the Law on the Bar (consolidated text Journal of Laws of 2016 item 615) [Ustawa z dnia 26 maja 1982 r. Prawo o adwokaturze (tekst jedn. z dnia 6 maja 2015, Dz.U. z 2015 r. poz. 615)].

14 The Act of 6 July 1982 on the Legal Advisors' (consolidated text Journal of Laws of 6 July 1982, [ustawa z dnia 6 lipca 1982 r. o radcach prawnych (tekst jedn. z dnia 25 marca 2016, Dz.U. z 2016 r. poz. 233)].

15 The Act of 20 June 1985 – the Law on the Public Prosecutor's Office (Journal of Laws of 1985, No. 31, item 138, as amended), [Ustawa z dnia 20 czerwca 1985 r. Prawo o prokuraturze (Dz.U. z 1985 r. Nr 31, poz. 138 ze zm.)].

“extended” cassation to the Supreme Court, which may be grounded both on “gross violation of law” and “gross incommensurability of disciplinary penalty”. These regulations were found in compliance with Art. 45 par. 1 of the Polish Constitution by the Constitutional Tribunal in the above quoted judgment of 25 June 2012<sup>16</sup>. Nevertheless, it is worth noticing that the term of gross incommensurability of disciplinary penalty as the grounds of cassation is quite restrictively treated in the Supreme Court’s case law because according to it, the application of Criminal Code’s norms within this scope would be impossible due to the specificity of disciplinary penalties and other measures of response to disciplinary offences determined in Art. 81 of the AA, i.e. particularly due to their inconclusive nature in most cases<sup>17</sup>.

With regard to the Act on Advocates (and the Act on Legal Advisors respectively), the Supreme Court’s opinion expressed in the ruling of 27 September 2012<sup>18</sup> has become outdated. It set forth that the accused advocate was not allowed to bring cassation against Higher Disciplinary Tribunal’s judgment issued in his case because it would circumvent the requirement envisaged in Art. 526 § 2 of the Code of Criminal Procedure<sup>19</sup>. Pursuant to the Constitutional Tribunal’s judgment<sup>20</sup> passed in the context of disciplinary proceedings against the advocate, Art. 526 § 2 of the CCP is inconsistent with Art. 45 par. 1 of the Polish Constitution within the scope of excluding a possibility of drafting and signing cassation in their own case by advocates or legal advisors.

Current Supreme Court’s case law on disciplinary proceedings against advocates underlines that these proceedings are similar to criminal proceedings while the legislator decided that standards and guaranties similar or identical to those functioning in criminal proceedings should be applied in disciplinary proceedings. According to the Supreme Court, it means, among others, that the accused takes advantage of procedural solutions assuring him or her with the fulfilment of the right to defence while the rule of immediacy is in force in the proceedings themselves<sup>21</sup>.

The most recent Supreme Court’s case law referring to disciplinary proceedings against legal advisors is also worth noticing. It has rightly recognized that *ne peius* ban specified in Art. 454 § 1 of the CCP is in force before Higher Disciplinary Tribunal of National Chamber of Legal Advisors, and it prohibits a disciplinary tribunal to

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16 K. 9/2010, OTK ZU 2012/6A item 66.

17 The decision of the Supreme Court of 17 November 2015, SDI 67/15, Lex No. 1849091.

18 VI KZ 12/12, Lex No. 122100.

19 See also the decision of the Supreme Court on the criminal case conducted by a lawyer as a private prosecutor of 15 June 2016., II KZ 16/16, Lex No. 2054092. This view of the Supreme Court was broadly consistent with the views of the commentators on the provisions on the disciplinary proceedings of advocates. See K. Kanty, T. Kanty, *Komentarz do przepisów o postępowaniu dyscyplinarnym adwokatów*, Warszawa – Gdańsk 2013, p. 234-235.

20 SK 2/15, OTK-A 2016.

21 The judgment of 27 July 2016, SDI 28/16.

sentence the accused legal advisor in the appeal proceedings if he or she was acquitted in the first instance<sup>22</sup>.

The Supreme Court's case law has pointed out significant relations between criminal procedure and disciplinary proceedings many times<sup>23</sup>. In the Resolution of Seven Judges of 28 September 2006<sup>24</sup> the Supreme Court decided that disciplinary proceedings are carried out independent of criminal proceedings including the subjective and objective identity of these proceedings. However, disciplinary tribunals should suspend disciplinary proceedings until criminal proceedings are closed if there is a need to apply Art. 108 § 4 of the Act on the Common Courts Organization (hereinafter referred to as ACCO)<sup>25</sup>, Art. 88 par. 2 of the AA and Art. 80 par. 3 of the ALA.

The second issue concerns aggravation of removal in appeals by the second instance disciplinary tribunals. The notion of removal should be understood as a disbarring penalty, i.e. deprivation of the right to practice a profession of a legal advisor. The second instance court cannot aggravate penalty by imposing a life imprisonment. Therefore if the provisions of the Code of Criminal Procedure are applied to disciplinary proceedings, removal cannot be imposed. Discrepancies in the Supreme Court's case law were resolved by the Resolution of Seven Judges of 30 June 2008<sup>26</sup> which stipulated that "this provision does not apply to disciplinary proceedings". According to the Supreme Court, an appellate court may impose a penalty of deprivation of the right to practice a profession in a criminal case. It is not embraced by the ban and therefore it would be paradoxical if such a penalty could be imposed in a criminal case while it could not be aggravated in disciplinary proceedings.

Referring to the issue of appeal against disciplinary authorities' decisions to common courts or the Supreme Court, we can notice **effaced terminology and deformed legal nature of appeal measures adopted in the criminal and civil procedure**.

As far as the Act of 27 July 2005 on Higher Education is concerned (hereinafter referred to as AHE)<sup>27</sup>, Art. 146 par. 4 stipulates that the parties are entitled to appeal

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22 The judgment of the Supreme Court of 23 September 2016., SDI 44/16, <http://www.sn.pl/orzecznictwo-> (accessed: 23 November 2016).

23 See W. Kozielewicz, *Postępowania dyscyplinarne w wolnych zawodach prawniczych w praktyce orzeczniczej SN* (in:) *Postępowania dyscyplinarne...*, pp. 39-45 and the same Author in this publication: *Rola Sądu Najwyższego w postępowaniu w sprawach dyscyplinarnych*.

24 I KZP 8/06, I OSKW 10/2006, item 87.

25 The Act of 21 July 2001 – the Law on the Organisation of Common Courts (consolidated text Journal of Laws of 2015, item 133), [Ustawa z dnia 21 lipca 2001 r. Prawo o ustroju sądów powszechnych (tekst jedn. Dz.U. z 2015 r. poz. 133)].

26 I KZP 11/08, OSNKW 2008, item 57.

27 The Act of 27 July 2005 – the Law on Higher Education (consolidated text Journal of Laws of 2016, item 1842) [Ustawa z dnia 27 lipca 2005 r. Prawo o szkolnictwie wyższym (tekst jedn.

against a binding decision of a disciplinary committee mentioned in Art. 142 par. 1 point 2 to the Court of Appeal in Warsaw – Labour and Social Security Chamber. The appeal is subject to the provisions of the Code of Civil Procedure referring to appeals. The appellate court's ruling is not subject to cassation but, as underlined in the comments, it is possible to complain to the Supreme Court about the acknowledgment of inconsistency of the valid ruling of the Court of Appeals in Warsaw with the law<sup>28</sup>.

The Act on Higher Education does not determine the grounds of an appeal. Yet, pursuant to Art. 368 of the Code of Civil Procedure, an appeal should satisfy the requirements envisaged for pleadings. Moreover, it should contain a number of the judgment it has been appealed against indicating whether it is appealed against fully or partially, a brief presentation of charges and their reasoning, a quotation of new facts and evidence if necessary, and confirmation that they could not be invoked before the first instance court or that the need to quote them arose later, as well as a motion for changing or reversing the judgment indicating the scope of the requested change or reversal.

The comments to the Act on Higher Education emphasize that submission of an appeal entails that the case is handed over from the academic environment to independent, sovereign and impartial judicial authority while the accused academic teacher is provided with a possibility of exercising the constitutional right to a trial – one of the foundations of a democratic state of law<sup>29</sup>.

It should be noticed that appropriate application of the provisions on appealing would enforce the use of suspensory effect of a civil appeal with regard to valid (binding) judgments, i.e. to terminate enforcement of the judgment under appeal. However, par. 5 Art. 146 of the AHE envisages that a disciplinary committee conveys information about a valid judgment in cases of infringements mentioned in Art. 144 par. 3 points 1-5 (i.e. cases connected with copyright and scientific research) to a body providing funds to science, that is a competent minister of science.

The thesis about a lack of suspensory effect of an appeal to the Court of Appeal in Warsaw is further confirmed by the Regulation of Minister of Science and Higher Education of 17 October 2014 on a special course of explanatory and disciplinary proceedings against academic teachers and manners of enforcing and effacing disciplinary penalties<sup>30</sup>. § 42 thereof stipulates that immediately after receiving a valid judgment of a disciplinary committee, Rector orders the enforcement of a disciplinary penalty envisaged by the sentence and attachment of the judgment's

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Dz.U. z 2016 r. poz. 1842)].

28 H. Izdebski, *Prawo o szkolnictwie wyższym. Komentarz*, Lex/el 2015.

29 See for example the decision of the Supreme Court of 22 October 1999, I PKN 216/99, OSNAPiUS 2001, No. 5, item 165. P. Wajda, A. Wiktorowska (in:) W. Sanetra, M. Wierzbowski (eds.), *Prawo o szkolnictwie wyższym. Komentarz*, Lex/el 2013.

30 *Journal of Laws of 2014*, item 1430 (Dz.U. z 2014 r. poz. 1430).



copy to the academic teacher's personal file as well as serving it with the Minister and supervising Minister.

What is more, information about employment relation terminated due to imposed disciplinary penalty in the form of deprivation of the right to practice a profession of a teacher is permanently attached to the academic teacher's employment certificate (§ 43 of the above Regulation). Only when a judgment of a disciplinary committee on deprivation of the right to practice a profession of a teacher is changed by the Court of Appeal and another, more lenient disciplinary penalty is imposed or acquittal, the grounds for the confirmation of the expiry of employment relation are dropped and it is re-commenced without the need to submit a declaration of will by an employer. An academic teacher, on the other hand, is entitled to be admitted to work<sup>31</sup>.

It seems that the model of appealing against disciplinary authorities' judgments to common courts also depends on the legislator's trust in legal qualifications and prestige enjoyed by a given legal profession, judges in particular. First instance disciplinary tribunals to handle judges' cases are locally competent courts of appeal whereas the Supreme Court is the court of appeal (Art. 110 par. 1 of the ACCO). As far as procedural issues are concerned, attention should be paid to Art. 121 § 1 of the ACCO stipulating that the accused, Disciplinary Ombudsman, National Council of the Judiciary and Minister of Justice are entitled to appeal against first instance disciplinary tribunals' judgments as well as decisions and regulations terminating the procedure to pass a verdict.

The appeal should be heard within two months from the day it was received by a second instance disciplinary tribunal (Art. 121 § 2 of the ACCO). Furthermore, the appeal is subject to the provisions of criminal procedure as to the appeal's form and manner of submission. In particular, the appellant should quote the settlement or decision under appeal and determine his or her claims. The comments to Art. 121 of the ACCO underline that although the accused judge is in principle a highly qualified lawyer, it appears that he or she should not be subject to obligations burdening Disciplinary Ombudsman and defence counsel resulting from Art. 427 § 2 of the Code of Criminal Procedure, which involve indication of charges brought against the settlement and drafting reasoning to the appeal. Too many formalities within the above scope could limit the right to defence<sup>32</sup>. However, according to the Supreme Court's case law, failure to quote in the appeal not only the scope of the first instance disciplinary tribunal's settlement under appeal but also appeal conclusions and, in fact, even charges (Art. 425 § 2 and Art. 433 § 1 of the CCP) impedes the examination of "the measure of appeal" by the Supreme Court<sup>33</sup>. The appellant may also quote

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31 E. Ura (in:) *Akademickie prawo pracy. Komentarz do art. 107-158 oraz 196-201a i 226 ustawy Prawo o szkolnictwie wyższym*, K.W. Baran (ed.) SN, Lex/el 2015 and the case-law provided there.

32 J. Sawiński (in:) A. Górski (ed.), *Prawo o ustroju sądów powszechnych. Komentarz*, Lex 2013.

33 The resolution of the Supreme Court of 10 January 2008, SNO 85/07, OSNSD 2008, item 19.

new facts or evidence but only if he or she was not able to quote them before the first instance court (Art. 427 § 3 of the CCP in the reading in force since 15 April 2016).

An appeal on the issue of guilt challenges the entire judgment whereas an appeal on the issue of penalty challenges the entire settlement on punishment and penal measures. An appeal may refer to charges which did not or could not be the object of complaint (Art. 447 of the CCP). Due to the appropriate application of the Code of Criminal Procedure in disciplinary proceedings against judges, it should be recognized that both absolute grounds of appeal under Art. 439 § 1 of the CCP and relative grounds of appeal under Art. 438 of the CCP may be the grounds of appeal.

The Supreme Court hears a case within the limits of challenge (equivalent to appeal) unless the Act envisages a wider scope thereof<sup>34</sup>. The Supreme Court is obliged to consider all conclusions and charges quoted in the appeal (Art. 433 of the CCP); it may render a verdict against the accused only if the appeal was submitted against him or her but still solely within the limits of the appeal. If the appeal has been submitted by Disciplinary Ombudsman (of the National Council of the Judiciary or Minister of Justice), the Supreme Court may render a verdict against the accused only if defaults quoted in the appeal have been confirmed or they are subject to be included *ex officio*. The appeal submitted against the accused may also result in a verdict in his or her favour<sup>35</sup>. The Supreme Court may limit the appeal's examination only to individual defaults raised by the party or subject to be included *ex officio* if the examination within such a scope is sufficient to pass a verdict while the examination of other defaults would be premature or groundless for further proceedings (Art. 436 of the CCP).

## **5. The impact of criminal procedure's reforms on the models of disciplinary proceedings**

The study has been limited to a quite controversial thesis according to which the so called great reform of the CCP's provisions of 1 July 2015 applied solely and respectively to disciplinary proceedings did not significantly affect the course of proceedings before disciplinary tribunals (at least due to a short period of the amendment – until 15 April 2016). The above conclusion is justified by the fact that between 2015 and 2016, no considerable changes were introduced to these procedures; in particular, the principle of enhanced adversarial proceedings of a main hearing envisaged by Art. 167 of the CCP in the version of 1 July 2015 was not included therein. Referring to the subject matter of the study, only changes within the scope of appealing against disciplinary tribunals' judgments to the Supreme Court or under

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34 The judgement of 29 June 2007, SNO 37/07, OSNSD 2007, item 54.

35 Art. 434 CCP; judgement of 12 November 2003, SNO 70/03, OSNSD 2003, No. 2, item 64.

cassation or appeal (with regard to judges) should be found important. Limitation of prosecutors' disciplinary liability resulting from the new Act on Prosecutors<sup>36</sup> should also be mentioned here.

As far as criminal procedure is concerned, the impact of the amended criminal procedure embracing the period from 2013 to 2016 on disciplinary proceedings should be discussed at two different levels. With regard to disciplinary proceedings against judges, we should notice that changed Art. 434 § 2 of the CCP was upheld by the amendment of 15 April 2016 (and implemented since 1 July 2015). Pursuant to this Article, a measure of appeal submitted against the defendant may effect in the judgment in his or her favour too under the circumstances determined in Art. 440 or Art. 455 of the CCP. What is more, it is necessary to include the institution of the so called relative limitation of evidence in appeal proceedings envisaged by the currently valid Art. 427 § 2 of the CCP.

Furthermore, we should pay attention to the amended regulation of Art. 452 of the CCP extending the scope of hearing evidence (including the essence of the case – repealed Art. 452 § 1 of the CCP) and a limited possibility of returning the case by the appeal court to be re-examined (Art. 437 § 2 of the CCP). Generally, the above considerations do not directly refer to members of corporations who are not judges and who are solely entitled to an extraordinary measure of appeal in the form of cassation to the Supreme Court, that is to say they may be applied in disciplinary proceedings only respectively – within the scope envisaged by Art. 518 of the CCP.

With regard to the regulation of disciplinary liability in the new Act on Prosecutors of 12 January 2016<sup>37</sup>, as far as procedural matters are concerned, Art. 163 of the above Act envisages in § 1 that the parties and General Prosecutor are entitled to appeal against the judgment of the Appeal Disciplinary Tribunal in the form of cassation to the Supreme Court. Cassation may be submitted due to the gross violation of law or gross incommensurability of disciplinary penalty. The parties must bring cassation within thirty days whereas General Prosecutor – within three months from the service of the judgment with reasoning to the party or General Prosecutor, respectively.

The party brings cassation through the disciplinary tribunal which passed the judgment under appeal whereas General Prosecutor submits cassation directly to the Supreme Court (Art. 163 § 3 and 4 of the Act on Prosecutors). The Supreme Court examines cassation in a hearing in the bench composed of three judges (Art. 163 § 5 of the Act on Prosecutors).

Within the context of substantive law bases of disciplinary liability of prosecutors, regulation of Art. 137 par. 2 of the above quoted Act on Prosecutors of 2016 appears

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36 The Act of 28 January 2016 – the Law on the Public Prosecutor's Office (Journal of Laws of 2016, item 178) [Ustawa z dnia 28 stycznia 2016 r. – prawo o prokuraturze (Dz.U. z 2016 r. poz. 178)].

37 Journal of Laws of 2016, item 177.

essential. It stipulates that an act or omission of an act undertaken by a prosecutor solely in public interest is not a disciplinary offence. It appears that due to a broad and blurred scope of the term “public interest” evoking a lot of controversy in the doctrine and whose advocate is, among others, a prosecutor<sup>38</sup>, this specific countertype of disciplinary liability may be interpreted too broadly, eventually weakening the protection of the rights of other participants of a criminal trial.

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38 On the subject of the concept of social interest and the role of the prosecutor as a spokesman for the social interest see: L. Mazowiecka, Prokurator Generalny jako rzecznik interesu społecznego, (in:) System prawa karnego procesowego P. Hofmański (ed.), vol. VI, Strony i inni uczestnicy postępowania karnego, C. Kulesza (ed.), Warszawa 2016, pp. 1163-1186 i R.A. Stefański, Prokurator jako rzecznik interesu społecznego, *Ibidem*, pp. 1189-1247 and the literature given there.