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The Legal Character of Polish Disciplinary Proceedings for Advocates and Legal Advisers in Light of the Case Law of the Polish Constitutional Tribunal and the European Court of Human Rights

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Abstract: The article presents an analysis of the case law of the Polish Constitutional Court and the European Court of Human Rights regarding the nature of disciplinary proceedings for advocates and legal advisers in Poland. The analysis is based on a comparison of the standards outlined in the case law of both courts, demonstrating that disciplinary proceedings in legal professions in Poland have a repressive character, even though they are not formally criminal proceedings.

1. Introduction

Disciplinary liability, and consequently the proceedings concerning it, is one of the means ensuring that the bodies of self-governing professional associations exercise supervision over the lawful performance of professional duties by representatives of these professions (Article 17 of the Polish Constitution).[1] In general, it pertains to liability for conduct contrary to law, ethical principles, or the dignity of the profession, as well as for violations of professional

This text expands on the considerations contained in the author's doctoral dissertation titled "The Appropriate Application of the Code of Criminal Procedure in Disciplinary Proceedings of Lawyers and Legal Advisers," which has not been published yet.

[1] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 1997 no. 78, item 483.

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duties or rules governing the exercise of a particular profession or office. Disciplinary liability applies to representatives of various professional groups, including legal professions such as advocates and legal advisers.

Since disciplinary liability does not fit neatly into the categories of criminal, civil, administrative, or other forms of liability, its precise nature requires examination. An analysis of jurisprudence leads to the conclusion that there is a divergence of views on this matter, and disciplinary proceedings are treated differently in constitutional and convention-based regulations. This prompts reflection on the essence of such proceedings and on which judicial perspective most accurately captures their legal character.

2. The Nature of Disciplinary Proceedings Based on the Jurisprudence of the Polish Constitutional Tribunal

Disciplinary proceedings are subject to several provisions of the Polish Constitution, which establish constitutional standards for such proceedings. The analysis of constitutional regulations and the jurisprudence of the Constitutional Tribunal allows for an assessment not only of the constitutionality of specific legal provisions regulating disciplinary liability and proceedings, but also leads to conclusions regarding the repressive nature of disciplinary processes as a specific type of proceedings. The analysis of the Constitutional Tribunal's case law indicates that disciplinary proceedings are treated as repressive proceedings, falling under the broad category of criminal proceedings (*sensu largo*).[2]

A key argument supporting this classification is the application of fundamental constitutional standards governing criminal proceedings in disciplinary cases: the presumption of innocence under Article 42(3) of the Polish Constitution, the right to defense under Article 42(2), and the principle of legality under Article 42(1). The Tribunal has expressed its stance on this issue primarily in its rulings concerning disciplinary or professional

[2] See: Paweł Czarnecki, "Stosowanie kodeksu karnego w postępowaniach dyscyplinarnych," *Państwo i Prawo* 72, no. 10 (2017): 101; see also: Katarzyna Gajda-Roszczynialska and Krystian Markiewicz, "Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland," *Hague Journal on the Rule of Law* 12 (2020): 451 et seq., https://doi.org/10.1007/s40803-020-00146-y; Karolina Kremens, "The Model of Disciplinary Proceedings against Prosecutors – Selected Issues," *Białostockie Studia Prawnicze* 22, no. 1 (2017): 33 et seq., https://doi.org/10.15290/bsp.2017.22.01.en.03.

liability proceedings for legal professionals, police officers, doctors, and academic teachers. The application of provisions that establish standards for criminal proceedings to disciplinary cases is a significant argument for recognizing their repressive nature.[3] Justifying the application of Article 42(3) of the Polish Constitution to non-criminal cases, the Tribunal referred to the necessity of ensuring participants in these proceedings certain procedural rights and safeguards.[4] It emphasized that the inclusion of provisions on the presumption of innocence among civil rights and freedoms in the Constitution may, in exceptional situations, extend the principle's applicability beyond the framework of criminal proceedings to other repressive proceedings. The primary role of this principle, along with other provisions defining the standards of repressive proceedings, is to provide the accused with specific procedural guarantees.

In its reasoning regarding disciplinary proceedings for academic teachers, the Tribunal cited the principle of a democratic state governed by law (Article 2 of the Polish Constitution) as the basis for extending the guarantees derived from Article 42 to proceedings other than criminal ones.[5] Similarly, in a case concerning administrative monetary penalties, the Tribunal pointed to the interdisciplinary nature of punitive mechanisms.[6]

A fundamental element allowing for the incorporation of the presumption of innocence into disciplinary proceedings is the concept of guilt. Therefore, the presumption of innocence does not affect the legal situation of participants in proceedings where guilt is not an issue, such as administrative

3 Polish Constitutional Tribunal, Judgment of 2 September 2008, Ref. No. K 35/06, OTK-A 2008, no. 7, item 120, reasoning point 3, referring to disciplinary proceedings of police officers; see also: Izabela Urbaniak-Mastalerz, "Application of the Provisions of the Code of Criminal Procedure in Disciplinary Proceedings Against Attorneys," *Białostockie Studia Prawnicze* 22, no. 1 (2017): 85 et seq., https://doi.org/10.15290/bsp.2017.22.01.en.07.

4 Polish Constitutional Tribunal, Judgment of 4 July 2002, Ref. No. P 12/01, OTK-A 2002, no. 4, item 50, reasoning point 3, referring to proceedings concerning liability under Article 172 of the Regulation of the President of the Republic of Poland of 24 October 1934 – Bankruptcy Law, consolidated text: Journal of Laws 1991 no. 118, item 512, as amended.

5 See: Polish Constitutional Tribunal, Judgment of 27 February 2001, Ref. No. K 22/00, OTK 2001, no. 3, item 48, reasoning point V.

6 See: Polish Constitutional Tribunal, Judgment of 5 October 2013, Ref. No. P 26/11, OTK-A 2013, no. 7, item 99, reasoning point 5.3.

cases.[7] Consequently, the application of this constitutional principle in disciplinary cases supports their classification as criminal proceedings *sensu largo*. The Constitutional Tribunal has extensively outlined a catalogue of criminal cases *sensu largo*, where the criterion of guilt determines the applicability of Article 42(3) of the Constitution. These include misdemeanor proceedings,[8] proceedings concerning the liability of collective entities,[9] and lustration proceedings.[10] Most importantly, the Tribunal explicitly stated that the presumption of innocence applies to disciplinary proceedings.[11] In its ruling on case K 22/00, the Tribunal emphasized the protective aspect of the presumption of innocence, which should be incorporated into disciplinary proceedings to fulfil the requirement of procedural guarantees. In disciplinary proceedings (as in criminal proceedings), the presumption of innocence defines the procedural position of the accused, requiring the adjudicating authority to adopt a "temporary truth" until the evidence presented in the proceedings demonstrates that the actual truth differs.[12]

Undoubtedly, Article 42(2) of the Polish Constitution, which guarantees the right to defense, also applies to disciplinary proceedings. This is evidenced, among other things, by the provisions of the professional laws governing attorneys and legal advisers – Article 94 of the Law on the Bar[13] and Article 68(4) of the Law on Legal Advisers.[14] However, the application of the

7 See: Piotr Karlik, Tomasz Sroka, and Paweł Wiliński, "Commentary on Article 42," in *Konstytucja Rzeczypospolitej Polskiej. Tom I. Komentarz*, eds. Marek Safian and Leszek Bosek (Warsaw 2016), nb. 248, Legalis.

8 See: Polish Constitutional Tribunal, Judgment of 8 July 2003, Ref. No. P 10/02, OTK-A 2003, no. 6, item 62, reasoning point 6.

9 See: Polish Constitutional Tribunal, Judgment of 11 September 2001, Ref. No. SK 17/00, OTK 2001, no. 6, item 165, reasoning point 2.

10 See: Polish Constitutional Tribunal, Judgment of 2 April 2015, Ref. No. P 31/12, OTK-A 2015, no. 4, item 44, reasoning point 3.2.

11 See, among others, Polish Constitutional Tribunal, Judgment of 27 February 2001, Ref. No. K 22/00, OTK 2001, no. 3, item 48, reasoning points V and VI.

12 See: Polish Constitutional Tribunal, Judgment of 27 February 2001, Ref. No. K 22/00, OTK 2001, no. 3, item 48, reasoning point VI; see also: Polish Supreme Court, Judgment of 18 January 1991, Ref. No. I KR 120/90, OSP 1991, no. 10, item 248; Polish Supreme Court, Judgment of 8 January 1988, Ref. No. IV KR 175/87, OSPiKA 1989, no. 1, item 12.

13 The Act of 26 May 1982, Law on the Bar, consolidated text: Journal of Laws 2024, item 1564.

14 The Act of 6 July 1982, Law on the Legal Advisors, consolidated text: Journal of Laws 2024, item 499.

principle of the right to defense also results from constitutional jurisprudence, where a well-established view holds that Article 42(2) of the Polish Constitution refers to repressive proceedings in general, which is a broader concept than criminal proceedings regulated by the Code of Criminal Procedure.[15] The application of the constitutional provision means that in disciplinary proceedings against attorneys and legal advisers, the accused not only has the right to legal representation, but also the right to actively defend against the charges. This right necessitates ensuring that the accused has the opportunity to actively influence the course of the proceedings, including the ability to actively participate, submit explanations, file evidence motions, participate in evidentiary proceedings, challenge decisions through legal means,[16] and take all actions aimed at improving their procedural position.

Among the constitutional provisions relevant to disciplinary proceedings, the principle of legalism enshrined in Article 42(1) of the Polish Constitution should also be mentioned. Legal scholarship emphasizes that the term "criminal liability" used in this provision has an autonomous meaning.[17] Accepting a different concept and interpreting this term strictly in accordance with statutory provisions would allow for circumventing constitutional guarantees applicable to all forms of punishment by formally classifying a given type of liability as something other than criminal.[18] Although the Polish Constitutional Tribunal has not explicitly defined the term "criminal liability" under Article 42(1) of the Constitution, it is

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15 See: Polish Constitutional Tribunal, Judgment of 26 November 2003, Ref. No. SK 22/02, OTK-A 2003, no. 9, item 97, justification point 4, relating to misdemeanor proceedings; Polish Constitutional Tribunal, Judgment of 3 November 2004, Ref. No. K 18/03, OTK-A 2004, no. 10, item 103, justification point 4, relating to proceedings concerning the liability of collective entities for acts prohibited under penalty; Polish Constitutional Tribunal, Judgment of 28 November 2007, Ref. No. K 39/07, OTK-A 2007, no. 10, item 129, justification points 2.2.2. and 11.2.1., relating to judicial immunity proceedings.

16 See: Monika Florczak-Wątor, in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. Piotr Tuleja (Warsaw: Wolters Kluwer, 2019), 150–4, LEX/el.

17 See, among others, Karlik, Sroka, and Wiliński, "Commentary on Article 42," no. 56; Bogusław Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (Warsaw: C.H. Beck, 2012), commentary on Article 42, no. 1; Marian Grzybowski, "Konstytucyjne ujęcie odpowiedzialności karnej (uwagi na marginesie wykładni art. 42 ust. 1 Konstytucji)," in *Państwo prawa i prawo karne. Księga Jubileuszowa profesora Andrzeja Zolla*, vol. 1, eds. Piotr Kardas, Tomasz Sroka, and Włodzimierz Wróbel (Warsaw: Wolters Kluwer Polska, 2012), 140.

18 See: Karlik, Sroka, and Wiliński, "Commentary on Article 42," no. 54.

indisputable from its jurisprudence that a key element of this liability is the imposition of penalties on individuals, subjecting them to some form of punishment or sanction.[19] This interpretation is primarily based on protective considerations and aims to ensure the broadest possible procedural protection for individuals. The Tribunal has ruled that the guarantees arising from Article 42(1) of the Polish Constitution also apply to disciplinary proceedings.[20]

The constitutional standard for assessing the fairness of disciplinary procedures should also be derived from Article 45(1) of the Polish Constitution, which establishes the right to a fair trial. This provision guarantees that everyone has the right to a fair and public hearing without undue delay by a competent, independent, impartial, and autonomous court.[21] In all types of proceedings, including repressive proceedings, the right to a court serves a crucial function in ensuring judicial oversight over the protection of civil rights and freedoms.[22] The Polish Constitutional Tribunal explicitly recognizes the existence of the right to a court in proceedings where "justice is not being administered" in the traditional sense, specifically citing disciplinary proceedings.[23] Furthermore, the repressive na-

19 See, among others, Polish Constitutional Tribunal, Judgment of 12 April 2011, Ref. No. P 90/08, OTK-A 2011, no. 3, item 21, justification point 4; Polish Constitutional Tribunal, Judgment of 20 May 2014, Ref. No. K 17/13, OTK-A 2014, no. 5, item 53, justification point 2; Polish Constitutional Tribunal, Judgment of 21 April 2015, Ref. No. P 40/13, OTK-A 2015, no. 4, item 4, justification point 3.

20 See: Polish Constitutional Tribunal, Judgment of 2 September 2008, Ref. No. K 35/06, OTK-A 2008, no. 7, item 120, justification point 6, relating to disciplinary proceedings for police officers; Polish Constitutional Tribunal, Judgment of 6 November 2012, Ref. No. K 21/11, OTK-A 2012, no. 10, item 119, justification point 2, relating to hunting disciplinary proceedings.

21 See: Cezary Kulesza, "Ewolucja wybranych procedur dyscyplinarnych w świetle konwencyjnego i konstytucyjnego standardu prawa do sądu," *Białostockie Studia Prawnicze* 22, no. 1 (2017): 11–22; Damian Gil, "Prawo do sądu karnego a inne postępowania represyjne (zagadnienia wybrane," in *Zbieg odpowiedzialności dyscyplinarnej z innego rodzaju odpowiedzialnością o charakterze represyjnym w służbach mundurowych*, eds. Bartłomiej Wróblewski, Piotr Jóźwiak, and Krzysztof Opaliński (Piła 2014), 35 et seq.

22 See: Polish Constitutional Tribunal, Judgment of 11 September 2001, Ref. No. SK 17/00, OTK 2001, no. 6, item 165, justification point 2.

23 See: Polish Constitutional Tribunal, Judgment of 6 November 2012, Ref. No. K 21/11, OTK-A 2012, no. 10, item 119, justification point 3.6, concerning hunting disciplinary proceedings.

ture of disciplinary proceedings and the existing standards for individual protection in such cases justify subjecting them to judicial review.[24] The Polish Constitution guarantees that judicial functions are exercised by an independent, impartial, and autonomous court. P. Sarnecki[25] may be correct in suggesting that the enumeration of these attributes constitutes a pleonasm, as they are inherently linked to the concept of a court. Nevertheless, their constitutional emphasis is necessary to ensure their realization within the judiciary and to safeguard its genuine independence from other branches of government. These three attributes – independence, impartiality, and autonomy – complement and reinforce one another, ensuring that courts can render decisions free from external pressures, based solely on objective criteria, and without favoring any party in the proceedings.

The right to a court as a guarantee of rights and freedoms cannot be separated from the right to a court understood as an individual subjective right.[26] Given that Article 45(1) of the Polish Constitution establishes a subjective right, participants in disciplinary proceedings are effectively protected under this provision, ensuring that their case is adjudicated in accordance with constitutional standards.[27] The constitutional principle of the right to a court serves as a safeguard for strengthening the procedural rights of individuals in disciplinary proceedings.[28] However, the direct realization of the right to a court, which administers justice, only occurs through the possibility of filing a cassation appeal with the Supreme Court. The procedural safeguards surrounding disciplinary proceedings before professional self-governing courts (e.g. corporate courts), which partially correspond to the requirements of Article 45(1) of the Polish Constitution,

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24 See: Norbert Gesek, "Glosa do wyroku Trybunału Konstytucyjnego z dnia 6 listopada 2012 r., K 21/11," *Przegląd Sejmowy*, no. 5 (2013): 161.

25 Paweł Sarnecki, "Commentary to Article 45," in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 2, eds. Leszek Garlicki and Marek Zubik, t. 10 (Warsaw: Wydawnictwo Sejmowe, 2016), LEX/el.

26 Ibid., t. 15.

27 "Article 45(1) and Article 77(2) of the Constitution of the Republic of Poland establish subjective rights that may be protected through a constitutional complaint" – Polish Constitutional Tribunal, Judgment of 3 October 2017, Ref. No. SK 31/15, LEX no. 2361199, justification point 5.2.

28 See: Sławomir Pilipiec, "Prawo do sądu w sprawach dyscyplinarnych radców prawnych," *Studia Iuridica Lublinensia* 25, no. 3 (2016): 762.

do not equate these bodies with courts in the constitutional sense. A court, in the constitutional meaning, is exclusively an entity representing the judiciary as defined in Article 10(2) of the Polish Constitution and responsible for the administration of justice. In this context, it is worth noting that Article 45(1) of the Polish Constitution was a control standard in case K 9/10.[29] This case concerned the right of the accused to a court in disciplinary proceedings. The constitutional issue at stake was the incomplete scope of judicial review over disciplinary proceedings for attorneys, legal advisers, notaries, and prosecutors. The Tribunal ruled that the model of cassation proceedings in these cases was consistent with Article 45(1) of the Polish Constitution. Consequently, restricting the possibility of filing a cassation appeal to the Supreme Court only against second-instance disciplinary court decisions that resulted in "gross violations of the law" or "gross disproportionality of disciplinary punishment" does not constitute a violation of the right to a court. From the perspective of the nature of disciplinary proceedings, this ruling provides an important interpretative guideline. The Tribunal unequivocally determined that the regulations governing cassation appeals in attorney and legal advisers disciplinary cases meet constitutional standards, as they sufficiently ensure access to a court within the meaning of Article 45(1) of the Polish Constitution.

3. The Nature of Disciplinary Proceedings as Derived from the Case Law of the ECtHR

In the case law of the European Court of Human Rights (ECtHR), starting with the case of *Engel and Others v. the Netherlands*,[30] which concerned the disciplinary responsibility of soldiers, criteria have been developed to classify a given case as a criminal case. These criteria include: the classification of the case under domestic law, the nature of the act in question, and the type and severity of the sanction provided for in domestic legislation.[31] However,

[29] Polish Constitutional Tribunal, Judgment of 25 June 2012, Ref. No. K 9/10, OTK-A 2012, no. 6, item 66.

[30] See: ECtHR Judgment of 23 November 1973, Engel and Others v. the Netherlands, application no. 5100/71, paras. 9–11.

[31] See more broadly: Małgorzata Wąsek-Wiaderek, "Postępowanie dyscyplinarne w orzecznictwie Europejskiego Trybunału Praw Człowieka," *Rejent – Special Issue* (2010): 75; Piotr Hofmański and Andrzej Wróbel, "Commentary on Article 6," in *Konwencja o Ochronie Praw*

not all of these criteria have equal influence on the final classification of a case. The first criterion – the classification under domestic law – is of supplementary importance and primarily serves as a starting point for further analysis.[32] This stems from the fact that the concept of "criminal charge" in Article 6(1) of the European Convention on Human Rights (ECHR) has an autonomous character, meaning that domestic classification is not decisive. It should also be noted that for a case to be considered "criminal," not all of the indicated criteria must be met simultaneously – fulfilling one of them is sufficient, though meeting two or all three is also possible.[33]

Within the criterion of the nature of the act, two key elements should be considered. The first is the subjective scope of the rule whose violation constitutes a prohibited act. To classify a case as criminal, the rule should be generally binding rather than applying only to specific individuals or groups. Secondly, for a case to be considered criminal under ECtHR jurisprudence, the rule must have a retributive purpose, encompassing both prevention and repression.[34] However, the most significant criterion is the type of sanction that may be imposed in the given proceedings. What matters here is the maximum possible penalty for committing the act in question, rather than the penalty actually imposed in the case.[35] Given inconsistencies in the Court's case law, S. Treschel rightly argued that the threat of imprisonment is not an absolute criterion for determining that

Człowieka i Podstawowych Wolności, vol. 1, *Komentarz do artykułów 1–18*, ed. Leszek Garlicki (Warsaw: C.H. Beck, 2010), no. 70 et seq., Legalis; Katarzyna Dudka, "Węzłowe problemy odpowiedzialności dyscyplinarnej żołnierzy na tle zbiegu odpowiedzialności dyscyplinarnej z innego rodzaju odpowiedzialnością represyjną," in *Zbieg odpowiedzialności dyscyplinarnej z innego rodzaju odpowiedzialnością o charakterze represyjnym w służbach mundurowych*, eds. Bartłomiej Wróbleski, Piotr Jóźwiak, and Krzysztof Opaliński (Piła, 2014), 31 et seq.

32 See: ECtHR Judgment of 10 June 1996, Benham v. the United Kingdom, application no. 19380/92, para. 55; ECtHR Judgment of 22 May 1990, Weber v. Switzerland, application no. 11034/84, para. 31.

33 See: ECtHR Judgment of 9 October 2003, Ezeh and Connors v. the United Kingdom, applications no. 39655/98 and 40086/98, para. 86; ECtHR Judgment of 16 January 2007, Bell v. the United Kingdom, application no. 41534/98, para. 36.

34 See: ECtHR Judgment of 28 September 1999, Öztürk v. Turkey, application no. 22479/93, para. 53; ECtHR Judgment of 2 September 1998, Lauko v. Slovakia, application no. 26138/95, para. 58.

35 See: ECtHR Judgment of 27 August 1991, Demicoli v. Malta, application no. 13057/87, para. 33.

a case is criminal, but creates a strong presumption in favor of such a classification.[36] The same applies to financial penalties (fines). When a fine is at stake, auxiliary criteria for classifying a case as criminal include the possibility of converting the fine into imprisonment[37] and the inclusion of the conviction in the relevant register.[38] Cases where the sanction involves a ban on practicing a profession or holding a particular function should be treated separately. While such sanctions can be highly burdensome, they do not constitute typical criminal penalties. In the Court's case law, cases involving such sanctions are classified as those determining civil rights and obligations.[39]

Considering these criteria, the Court has ruled on multiple occasions regarding the nature of disciplinary proceedings, determining whether they should be classified as "criminal charges" or as proceedings concerning "civil rights and obligations." In *Weber v. Switzerland*,[40] which concerned liability for breaching investigative secrecy, the Court attempted to define the concept of "disciplinary proceedings," stating that they occur particularly when they involve a breach of specific rules applicable to a given professional group. The prevailing stance in ECtHR case law is that disciplinary proceedings concern civil rights and obligations rather than constituting criminal cases.[41] In *Henning Sjöström v. Sweden*,[42] the Court

36 See: Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005), 23.

37 See: ECtHR Judgment of 23 March 1994, Revnsborg v. Sweden, application no. 14220/88, para. 35.

38 See: ECtHR Judgment of 28 September 1999, Öztürk v. Turkey, application no. 22479/93, para. 52.

39 See: ECtHR Judgment of 23 June 1981, Le Compte, Van Leuven, and De Meyere v. Belgium, applications no. 6878/75 and 7238/75, paras. 54–61.

40 See: ECtHR Judgment of 22 May 1990, Weber v. Switzerland, application no. 11034/84, para. 33.

41 See, for example, ECtHR Judgment of 20 May 1998, Gautrin and Others v. France, application no. 21260/93, para. 56; Adam Bodnar, "Postępowania dyscyplinarne w wolnych zawodach prawniczych w kontekście orzecznictwa ETPC," in *Postępowania dyscyplinarne w wolnych zawodach prawniczych. Model ustrojowy i praktyka*, eds. Adam Bodnar and Piotr Kubaszewski (Warsaw: Helsińska Fundacja Praw Człowieka, 2013), 22–5; also see: Cezary Kulesza, "Ewolucja zasad odpowiedzialności dyscyplinarnej lekarzy w kontekście gwarancji rzetelnego procesu," in *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla*, vol. 2, eds. Piotr Kardas, Tomasz Sroka, and Włodzimierz Wróbel (Warsaw: Lex a Wolters Kluwer business, 2012), 1676–92.

42 See: ECtHR Decision of 12 October 1992, Henning Sjöström v. Sweden, application no. 19853/92, paras. 1 and 2.

explicitly ruled out classifying disciplinary proceedings as criminal, stating that such proceedings – leading to the most severe disciplinary sanction of disbarment – could not be considered "criminal" under Article 6 of the Convention. Similarly, in *Linder v. Germany*,[43] the Court referred to its consistent classification of disciplinary proceedings against doctors as civil cases due to their focus on determining whether the individual could continue practicing (e.g. suspension or prohibition). The Court noted that similar criteria apply to disciplinary proceedings concerning legal professionals, provided that the disciplinary sanctions include suspension or removal from the relevant professional body.

It is important to note that classifying disciplinary cases as concerning civil rights and obligations has an autonomous significance from the perspective of the Convention.[44] This classification affects only the assessment of potential violations of the Convention and does not influence how disciplinary cases are classified within the legal systems of the Convention's signatory states. Furthermore, the Convention does not prohibit states from maintaining a distinction between criminal and disciplinary law or from setting the boundaries between them. However, this does not impact the interpretation of Convention provisions, but only affects national legal systems. The ECtHR has emphasized that

> if states were allowed by exercising their discretion and classifying an offence as disciplinary to exclude the application of fundamental guarantees under Articles 6 and 7, the applicability of these provisions would depend solely on their sovereign will. Such discretion would lead to results contrary to the object and purpose of the Convention.[45]

Despite classifying disciplinary cases as concerning civil rights and obligations, the fair trial standard derived from Article 6(1) ECHR still

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43 See: ECtHR Decision of 9 March 1999, Linder v. Germany, application no. 32813/96, point 2.a.

44 See: Astrid Sanders, "Does Article 6 of the European Convention on Human Rights Apply to Disciplinary Procedures in the Workplace?," *Oxford Journal of Legal Studies* 33, no. 4 (2013): 791–819, https://doi.org/10.1093/ojls/gqt030; Mario Chiavario, "Principles of Criminal Procedure and Their Application to Disciplinary Proceedings," *Revue internationale de droit pénal* 74, no. 3–4 (2003): 707–46.

45 See: ECtHR Judgment of 28 June 1984, Campbell and Fell v. the United Kingdom, application no. 7819/77, para. 68.

applies, albeit in a manner characteristic of such cases.[46] The procedural guarantees of this provision apply to all individuals subject to disciplinary proceedings, regardless of the final decision, i.e. whether or not they actually receive a disciplinary penalty affecting their ability to practice their profession. In disciplinary cases involving lawyers, the Court generally does not examine the applicability of Article 6(1) ECHR, considering the matter settled.[47] Although previous case law has focused primarily on disciplinary proceedings involving legal professionals in private practice, the established standards – classifying disciplinary cases as concerning civil rights and obligations and applying the guarantees of Article 6(1) ECHR – should also be extended to legal professionals holding public office, such as judges and prosecutors.[48]

An analysis of ECtHR jurisprudence reveals several specific procedural guarantees explicitly recognized as applicable to disciplinary proceedings.[49] A key consideration is whether a disciplinary court qualifies as a "court" under Article 6(1) ECHR. The concept of "court" in ECtHR case law has an autonomous meaning.[50] In the context of the status of disciplinary courts, an important position was expressed in *Le Compte, Van Leuven and De Meyere v. Belgium*.[51] The Court held that professional disciplinary bodies must generally meet the requirements of Article 6(1) ECHR and, if they do not, their decisions must be subject to review by

46 See: Chiavario, "Principles of Criminal Procedure," 719; Roland Miklau, "Austria, Principles of Criminal Procedure and Their Application in Disciplinary Proceedings," *Revue internationale de droit pénal* 74, no. 3 (2003): 799.

47 See, for example, ECtHR Judgment of 17 July 2008, Schmidt v. Austria, application no. 513/05.

48 The Court referred to a concept in which there is a rebuttable presumption of the application of Article 6(1) of the Convention in such cases, see: ECtHR Judgment of 19 April 2007, Vilho Eskelinen and Others v. Finland, application no. 63235/00, paras. 42–64.

49 See more broadly: Michał Indan-Pykno, "Postępowanie dyscyplinarne wobec adwokatów z perspektywy standardów Europejskiego Trybunału Praw Człowieka w Strasburgu," *Polski Rocznik Praw Człowieka i Prawa Humanitarnego* 5 (2014): 15–34; Kulesza, "Ewolucja wybranych procedur dyscyplinarnych," 11–22.

50 See: Marek A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka* (Warsaw: Wolters Kluwer Polska, 2017), 509–40; Wąsek-Wiaderek, "Postępowanie dyscyplinarne," 84–5.

51 See: ECtHR Judgment of 23 June 1981, Le Compte, Van Leuven and De Meyere v. Belgium, applications no. 6878/75 and 7238/75, paras. 54–61.

a judicial body. Based on this reasoning, two models of disciplinary courts satisfying ECtHR standards have emerged: either a professional body that is not a court in the strict sense, but fulfils all the guarantees under Article 6(1) ECHR, or a system in which decisions made by a body lacking such guarantees can be reviewed by an entity that unequivocally qualifies as a court under the Convention.

It should also be noted that the Court's interpretation of the term "court" is not strictly formalistic; it considers whether an entity exercises judicial functions.[52] Under this approach, the ECtHR has recognized, for example, a Belgian bar association body as a "court," despite its many administrative and advisory competencies, because it also adjudicated disciplinary cases.[53] Similarly, a Polish Regional Medical Court was classified as a "court" within the meaning of Article 6(1) ECHR.[54] In this Polish case, the Court held that assigning jurisdiction over disciplinary cases to professional disciplinary bodies does not, in itself, violate the Convention, even when Article 6(1) ECHR applies.

The principle of equality of arms also applies to disciplinary proceedings. It should be noted that this principle is not explicitly stated in Article 6(1) of the European Convention on Human Rights (ECHR), but it is unequivocally derived from the case law of the European Court of Human Rights (ECtHR).[55] An attempt to define this principle was made in the case of *Dombo Beheer B.V. v. the Netherlands*,[56] according to which each party to the proceedings must be provided with the same opportunity to present their case (including evidence) under conditions that do not place them at

52 See: ECtHR Judgment of 30 November 1987, H. v. Belgium, application no. 8950/80, para. 50; Wąsek-Wiaderek, "Postępowanie dyscyplinarne," 85.

53 See: ECtHR Judgment of 30 November 1987, H. v. Belgium, application no. 8950/80, paras. 49–55.

54 See: ECtHR Judgment of 16 December 2008, Frankowicz v. Poland, application no. 53025/99, para. 50.

55 See: ECtHR Judgment of 28 August 1991, Brandstetter v. Austria, applications no. 11170/84, 12876/87, and 13468/87, para. 66; ECtHR Judgment of 25 March 1998, Belziuk v. Poland, application no. 23103/93, para. 37; ECtHR Judgment of 18 March 2014, Beraru v. Romania, application no. 40107/04, para. 70; ECtHR Judgment of 13 September 2016, Ibrahim and Others v. the United Kingdom, applications no. 50541/08, 50571/08, 50573/08, and 40351/09, para. 251.

56 See: ECtHR Judgment of 27 October 1993, Dombo Beheer B.V. v. the Netherlands, application no. 14448/88, para. 33.

a disadvantage compared to their opponent.[57] In the case of *Olujić v. Croatia*, the ECtHR found a violation of the principle of equality of arms in disciplinary proceedings due to the unjustified dismissal of the defendant's evidentiary motions, thereby preventing them from presenting evidence in their defense, despite the prosecution's evidence being admitted and forming the basis of disciplinary liability.

A guarantee subject to protection in disciplinary proceedings is also the right to have the case heard within a reasonable time. In the case of *W.R. v. Austria*,[58] where the complaint was lodged in connection with disciplinary proceedings against a lawyer, the ECtHR ruled that the excessive length of the proceedings constituted a violation of Article 6(1) ECHR. It is, therefore, beyond dispute that disciplinary proceedings, regardless of their classification within a specific legal framework, should be conducted efficiently to fulfil the requirement of a reasonable timeframe for adjudication.

It is also worth noting that in its most recent case law, the Court has emphasized the application of safeguards such as the right to an independent and impartial tribunal within the framework of Polish disciplinary proceedings against advocates.[59]

It should not be overlooked that the ECtHR has refrained from explicitly determining whether serious disciplinary charges should be classified as civil or criminal for the purposes of Article 6 of the Convention.[60] In the case of Albert and Le Compte, the Court held that the civil and criminal aspects of Article 6 are not mutually exclusive and that the principles established in Article 6(2) and (3) ECHR apply *mutatis mutandis* to disciplinary proceedings covered by Article 6(1) in the same manner as they do to individuals accused of criminal offenses.[61]

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57 See: Trechsel, *Human Rights in Criminal Proceedings*, 96–7; Dražan Djukić, *The Right to Appeal in International Criminal Law* (Leiden: Brill, 2019), 53.

58 See: ECtHR Judgment of 21 December 1999, W.R. v. Austria, application no. 26602/95, paras. 25–31.

59 See: ECtHR Judgment of 22 July 2021, Reczkowicz v. Poland, application no. 43447/19.

60 Attention has been drawn in the literature, see: Hofmański and Ważny, "Commentary on Article 6," note 42; Marek A. Nowicki, *Komentarz do Konwekcji o ochronie praw człowieka i podstawowych wolności* (Warsaw: Wolters Kluwer Polska, 2021), 620.

61 See: ECtHR Judgment of 23 June 1981, Le Compte, Van Leuven and De Meyere v. Belgium, applications no. 6878/75 and 7238/75, paras. 30 and 39.

Despite the ECtHR generally recognizing disciplinary proceedings as adjudications on "civil rights and obligations," certain rights derived from Article 6(2) and (3) ECHR, such as the presumption of innocence[62] and the right to defense,[63] also apply in disciplinary proceedings. This is because these requirements constitute particular aspects of the right to a fair trial guaranteed by Article 6(1) of the Convention.[64] The specific guarantees established in Article 6(3) ECHR serve as an example of the notion of a fair trial concerning typical procedural situations that arise in punitive cases. However, their ultimate purpose is always to ensure or contribute to ensuring the fairness of criminal proceedings as a whole. The guarantees contained in Article 6(3) ECHR are, therefore, not an end in themselves and should be interpreted in light of their function concerning the overall proceedings.[65] Consequently, it should be concluded that Article 6(2) and (3) ECHR do not directly apply within the Strasbourg standard of disciplinary proceedings, as these provisions are explicitly dedicated to "criminal cases" under the Convention. Nevertheless, given the punitive nature of disciplinary proceedings, these guarantees should be understood as elements of the right to a fair trial under Article 6(1) ECHR.

4. Conclusions

Summarizing the foregoing considerations, it should be stated that disciplinary proceedings have a punitive character and constitute criminal proceedings in a broad sense (*sensu largo*).[66] This conclusion is supported by an analysis of Polish constitutional case law and the case law of the

62 See: ECtHR Judgment of 22 April 2010, Fatullayev v. Azerbaijan, application no. 40984/07, paras. 159–160; ECtHR Judgment of 15 July 2010, Šikić v. Croatia, application no. 9143/08, paras. 52–55.

63 See: ECtHR Judgment of 21 January 1984, Öztürk v. Germany, application no. 8544/79, para. 66.

64 See: ECtHR Judgment of 1 June 2010, Gäfgen v. Germany, application no. 22978/05, para. 168; ECtHR Judgment of 2 November 2010, Sakhnovskiy v. Russia, application no. 21272/03, paras. 94–98.

65 See: ECtHR Judgment of 13 September 2016, Ibrahim and Others v. the United Kingdom, applications no. 50541/08, 50571/08, 50573/08, and 40351/09, paras. 94–100; ECtHR Judgment of 12 June 1981, Can v. Austria, application no. 9300/81, paras. 52–56.

66 See similar statements: Marcin Wielec and Roland Szymczykiewicz, "Standardization of Disciplinary Responsibility in Legal Professions in the System of Polish Law – Conclusions de lege ferenda," *Prawo w Działaniu* 32 (2017): 35 et seq.

ECtHR. An examination of constitutional case law leads to the conclusion that disciplinary proceedings, including those concerning legal professionals, are classified as punitive proceedings. The key aspect is the incorporation of a minimum standard of criminal proceedings into these cases, as regulated in Articles 42(1)–(3) of the Polish Constitution. The Constitutional Tribunal explicitly states in the reasoning of its judgments that this standard should also apply to non-criminal cases, applying Articles 42(1)–(3) of the Polish Constitution appropriately, with modifications arising from the nature of the proceedings in which these provisions are applied. The realization of the right to a court as enshrined in Article 45(1) of the Polish Constitution is also significant.

The classification of disciplinary proceedings as punitive is not contradicted by the ECtHR's qualification of disciplinary cases as "determination of civil rights and obligations." The concepts contained therein and their interpretation have an autonomous character. The ECtHR itself, among the criteria for recognizing a case as criminal, indicates the possibility of treating a particular category of cases differently under national and Convention law. This occurs through the criterion that the classification of a given case within the domestic legal order is a factor in determining whether it constitutes a "criminal case." The decisive factor in the ECtHR's classification of disciplinary proceedings as civil is the possibility of imposing sanctions that limit or prevent the practice of a specific profession. However, the nature of the sanction does not negate other criteria derived from this case law, such as the severity of the disciplinary penalty or the application of a legal framework characteristic of criminal proceedings – in this case, through reference to the corresponding provisions of the Code of Criminal Procedure. The classification established in the ECtHR's case law does not negate the necessity of applying the standard of a fair trial to disciplinary proceedings. Moreover, the ECtHR explicitly indicates the need to apply the guarantees of Article 6(1) ECHR, and due to recognizing elements of repressiveness, it derives the minimum standard of criminal proceedings from Article 6(2) and (3) ECHR as general norms within Article 6(1) ECHR.

It is not erroneous if a single proceeding is classified differently in different legal systems. However, the essential nature of a given proceeding must have a core that aligns more closely with one of the fundamentally

distinct legal categories – in this case, criminal or civil proceedings, and in other situations, even administrative proceedings. In the context of disciplinary proceedings, what is crucial is that Polish constitutional case law explicitly classifies them as punitive proceedings, and ECtHR case law does not exclude such classification. While the ECtHR considers that, due to the criterion of the most severe sanction, i.e. loss of the right to practice a profession, disciplinary cases are more civil than criminal, it simultaneously partially equates the standard of fairness in such proceedings with that of criminal proceedings under Article 6(1) ECHR and also partially incorporates explicitly "criminal" rights under Article 6(2) and (3) ECHR.

In recognizing disciplinary proceedings as a form of broadly understood criminal liability, it is, of course, necessary to respect their distinctiveness. However, such respect for distinctiveness fits within the boundaries of the *sensu largo* criminal nature of this liability. The elements influencing the determination of this nature, as acknowledged in Strasbourg case law and granted in Polish constitutional case law – such as the preventive-retributive purpose of liability, ensuring access to a court within disciplinary proceedings, sanctions as the primary means of liability, and the necessity of fulfilling the culpability criterion – allow for the conclusion that, in essence, disciplinary proceedings are punitive and constitute criminal proceedings in a broad sense (*sensu largo*).

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