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Regarding the systematic measures of judicial reform

The main objective of the judicial and legal reform underway in Ukraine is establishment of comprehensive, independent and autonomous judicial system based on the rule of law in accordance with European standards of justice, which would be able to ensure the best standards of justice, effective proceedings in all legal cases with important legal implications and produce a fair judgment.

When evaluating the measures to improve effectiveness of the judicial system scholars and practitioners traditionally asses the work of judicial institutions only. Meanwhile, the judicial system is an open system (as defined by the systems theory), its main activity is closely associated with both persons that go to court and take part in the trial and the bodies that monitor the enforcement of judicial acts, thus ensuring practicability of restoration of and protection of infringed rights. «Openness» of the judicial system implies that it subject to mutual influence on the part of other social systems. Society as a whole (or the state), as a metasystem for the judicial system, is comprised of separate elements (subsystems) operating in accordance with established values and regulatory practice. Should these elements deviate from this established order, the function of the court in this mechanism is to bring them back in line with the established practice by protecting the rights and freedoms of the human and the citizen. In this way the judicial system contributes to the stability of society as a social system. At the same time, society, as an external environment in respect to the judiciary system, provides it with balanced resources (information, human, and material) required completing this task. Moreover, when elaborating its optimum model, in addition to external relationships, the quality of the functioning of the systems being considered is affected by the internal factors – the structure, the nature of re-

lationships among the elements of the system as well as its control mechanism. In this context of particular importance is the system of judicial self-governance, i.e. the possibility to influence its self-organization, to improve its form, control its adequate resource provision, etc.

In addition to the structure of the «ideal» model of the mechanism of interaction of the judicial system with other elements (other subsystems) of the general metasystem and the mechanism of interaction among the elements (courts) within the judicial system itself, when regards to the efficiency matters the system analysis theory singles out the *operation algorithm*. This concept reveals the mechanism of manifestation of intrinsic properties of the system that define its behavior according to the law of functioning. This law can be put to practice in different ways depending on different operation algorithms, with the system's different functioning quality and efficiency as a result[1]. In reference to the judiciary system this means that its efficiency is a function of the quality of judicial procedure. Finding the most appropriate forms of trial for each particular environment is an important element in optimization of the functioning of the judicial system.

At the same time, the number and complexity of cases to be heard by courts must correspond to the resources, i.e. information, human, financial, resources, etc., consumed by the judiciary system from the external environment. If the system's tasks at hand are beyond the required amount of resources, it impacts the efficiency of the system itself in a way that it shows maximum quality of performance of its functions with minimum resources consumed. In this situation, the quality should be monitored both using internal and external mechanisms, both public and social.

Unfortunately, there has not been any systematic scientific analysis of the effectiveness of the judicial system in Ukraine until now, though this issue has already been highlighted in research by international organizations and national sociological services. Nevertheless, their opinions have no binding effect for adoption of adequate management solutions. Thus, the European Commission for the Efficiency of Justice (CEPEJ) carried out a large-scale project to assess the efficiency of the judicial systems of the Council of Europe member states. As noted by the authors of this project, the data received should help national authorities «to identify shortcomings in the functioning of the national judicial system and encourage judicial reform»[2].

In our view, one can distinguish 4 main areas for improvement of the national judicial system: (a) adoption of the

[1] Шило, О. Г. Теоретико-прикладні основи реалізації конституційного права людини і громадянина на судовий захист у досудовому провадженні в кримінальному процесі України [Текст]: монографія / О. Г. Шило. – Х.: Право, 2011. – 472 с. – С. 37.

[2] Evaluation report of European judicial systems/European Commission for the Efficiency of Justice (CEPEJ) – Edition 2014 (2010 data): Efficiency and quality of justice [Електронний ресурс]. – Режим доступу: https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CEPEJ(2010)Evaluation&Language. – Заголовок з екрана

judiciary model optimal for Ukraine; (b) improvement of judicial procedure currently in effect; (c) optimization of the personnel policy of the judicial power; (d) solution of a number of problems regarding administration of the judicial system. Consistency of reform measures must ensure that the judicial reform yields the expected effect.

As far as the optimum Ukrainian judiciary model is concerned, each new «wave» of the judicial reform began exactly exactly with the structural reorganization of the judicial system. The search for the «optimum» model of the judicial system in most cases was reduced to addressing two main issues: (a) centralization / decentralization of the judicial system, and (b) scope of jurisdiction of courts. Thus, in 1996 the Constitutional Court of Ukraine was established; in 2001 all general jurisdiction courts were moved under the control of the single highest court – the Supreme Court of Ukraine; in 2002 they created a separate branch of the judicial system – the courts of administrative jurisdiction; in 2010 they set up the High Specialized Court of Ukraine for Civil and Criminal Cases, eliminated the subsystem of military courts, altered functions of the Supreme Court of Ukraine. Obviously, the search for the best judiciary model for Ukraine is still underway. In particular, today there is an ongoing debate on elimination of high specialized courts, merger of general and economic courts, etc. There are several thoughts we would like to share in this respect.

Note that under the currently effective Ukrainian Constitution of 1996 it is not possible to return to the tree-level court system by eliminating high specialized courts, since Ch. 3 Art. 125 provides for their a priori existence. However, we should probably have a closer look into the reasons why the issue of elimination of high specialized courts emerged on the agenda at all. We believe there are two reasons to this: Firstly, under the present system and procedure of court proceedings, the Supreme Court of Ukraine has limited powers to perform its basic function – to ensure integrity of judicial practice and exercise direct influence thereon. We believe that this problem can be resolved by amendments to the procedural law, while these amendments should (a) provide for the right of citizens to file appeals directly with the Supreme Court of Ukraine regarding rulings of high specialized courts, whereby the case is denied admission to review by the Supreme Court of Ukraine; and (b) to provide for incompliance with the legal opinion of the Supreme Court of Ukraine as an independent ground for cancellation of the judgment. The second reason to raise the issue of the elimination of high specialized courts is the actual practice of jurisdiction disputes, non-uniformity of practice of administration of law in such legal relations, which generally violates the international standard of justice – predictability of judicial decisions. In our view, this problem can also be solved by changes in substantive law, which, in particular, will grant the Supreme Court Plenum the right to resolve conflicts of jurisdiction between jurisdictions as well as to revoke the Resolution of high spe-

cialized courts if they lack unity as to interpretation of the rules of administration of law in such legal relations. Should such approach be acceptable, it would be appropriate to provide for the composition of the Plenum of the Supreme Court to consist of representatives of three jurisdictions. Finally, it should be added that exceptional powers vested onto the supreme court of a country is a common practice in Europe, therefore, the general idea of the drafters of the Law of Ukraine «On the Judicial System and Status of Judges» regarding the status of the Supreme Court should be supported, while legislative flaws found in actual practice can be eliminated as shown above, i.e. only by changes in procedural and substantive law with no need to initiate major reconstruction of the judicial system.

As regards abolishment of specialized economic (and, perhaps, administrative?) jurisdiction, it should be noted that the poly-system approach as a method to organize the judicial power is one of the world trends for development of modern judicial systems. It allows increasing specialization of judges and thus improving the quality of judicial decisions, which is an additional guarantee of efficiency of the judicial system. Therefore, we believe that in this respect, the problem of ever more distinct legislative division of powers among the judicial subsystems, development of methods of cooperation and coordination among them, proposition of a mechanism to resolve potential disputes is more important than reorganization of specialized jurisdiction. For that reason, as we already mentioned above, we suggest that the authority to resolve conflicts of jurisdiction and other contentious issues be vested to the Supreme Court of Ukraine, which would allow maintaining the integrity of the Ukrainian judicial system.

As far as the areas for improvement of judicial procedure are concerned, studies by scholars from different countries show that among the priority measures to improve judicial procedures the most prominent are 2 major problems: high cost and long time of litigation. As opinion polls show, these flaws are relevant for the national court system as well[1]. So, obviously, the optimization of judicial procedure, too, should focus on these two components.

As to the first component, i.e. cutting the costs of trial, we think that, firstly, it is important to develop institutions of legal aid to facilitate out-of-court settlement of legal disputes; secondly, it is reasonable to set up «appeal filters» and material sanctions for abuse of procedural rights to delay the process; thirdly, one should evaluate the positive effects of implementation of international practices with regard to the functioning of the system of private judgment enforcement agents.

As far as the second aspect, i.e. reduction of time of proceedings, one should bear in mind that the European Court of Human Rights considers dura-

[1] Стан корупції в Україні. Порівняльний аналіз загальнонаціональних досліджень: 2007–2009, 2011. Звіт за результатами соціологічних досліджень. [Текст] – Київ, 2011. – 47 с.

tion of the trial beyond reasonable time a violation of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and many European countries, such as: Belgium, Great Britain, Austria, Czech Republic, Denmark, Italy, Slovakia, Switzerland, Croatia, Bosnia and Herzegovina, France, Luxembourg, Norway, Spain, Sweden and others even legislated that unreasonable delay of the trial shall constitute grounds for the interested parties to initiate procedures to get financial compensation from the state. Most of Western countries have established practices to evaluate reasonable time for conduct of proceedings in different categories of cases– criminal, civil, administrative. In their report members of the working group of the European Commission for the Efficiency of Justice (CEPEJ) stated that the time of trial is one of the main indicators of the efficiency of courts. A prompt trial suggests that the courts made best use of available resources and is an evidence of efficient judicial procedures. Conversely, prolonged court hearings may signal existing problems and inefficiency of the judicial system[1].

Under the management theory, the common factors that lead to increased time needed to complete any activity are: (a) unjustified increased complexity of a job, (b) redundant work, and (c) inefficient methods used to complete it. In our view, better efficiency of judicial procedure with regard to its promptness can be achieved by complex measures in several areas, such as: organizational improvement of the judicial mechanism; development of institutions of out-of-court and pre-trial settlement of disputes; further development of the institutions of arbitration courts and similar institutions for other types of cases (so-called bodies of alternative justice); establishment of «filters» for review of cases in order to eliminate abuse of the law and deliberate delays in enforcement of the judgment; development of mechanisms of scientific organization of labor for judges, procedures for their professional development; introduction of a single form of filing petitions with the court, etc.

Regarding optimization of judicial personnel policy, its importance was emphasized still a while ago by a known lawyer of the past A. F. Koni, who noted: «no matter how good are the rules to govern any activity, they may lose their power and importance in inexperienced, rude and unscrupulous hands.» These are judges, real people with specific backgrounds, levels of socialization and sense of justice, rather than the court in general, who represent goals, means and cultural values of the society and act on behalf of the court as a social and legal institution, establish objective truth in a particular case heard in court, impose penalty or punishment and acquit thereof, make mistakes and correct them.

[1] Evaluation report of European judicial systems/European Commission for the Efficiency of Justice (CEPEJ) – Edition 2014 (2010 data): Efficiency and quality of justice [Електронний ресурс]. – Режим доступу: https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CEPEJ(2010)Evaluation&Language. – Заголовок з екрана

However, in our view, the most important problem of the modern judicial system is the low level of social respect for the judge, and, hence, tools of the judicial power as a part of comprehensive personnel policy effort should include not only measures of material and legal protection of judges, but also «social rehabilitation» of the trade to enhance the court's authority, respect and credit in the eyes of the citizens, among other things, due to positive model of a judge as a first-class expert. Therefore, the main areas for improvement of the professional quality of the judiciary, in our opinion, are: (a) development of the Standards of compliance with judicial profession, (b) optimization of the procedure for the choice of judicial candidates, and (c) establishment an effective mechanism to monitor their professional competence. As far as the first area is concerned, today we see a separate branch conventionally called «judicial anthropology» to originate and take shape in the framework of the current theory of the judicature. It is a system of ideas about a «human judge» – a person involved in judicial administration of law, the specifics of its influence on the social environment, about his or her spiritual sphere and the formation of the legal system. Although the judicial procedure is highly formalized, yet, legal provisions are interpreted by a human, that is a person endowed with consciousness and will. This allows us to suggest a direct relationship between personal qualities of the judge and efficiency of the judicial system since the entire process of applying a provision of law to legal relations in dispute is conscious and purposeful. In other words, one should admit that the procedural law itself cannot guarantee quality of justice to the society because it can be subject to personal qualities of the judge. An argument to support this conclusion is the practice of reversal (change) of court decisions by another competent judge (as by revision of a case in accordance with the law). If personal qualities of the judge had no impact on the process of examination of the evidence, choice of appropriate regulation and its application to the particular case, judgments by the first instance court would hardly be ever changed by the court of higher jurisdiction. As was justly noted by Yu. M. Groshevyi, the personality of the judge takes shape and develops in judicial activity under directed influence of not only the society and the state that defines the goals, objectives and methods of administration of justice and ensures normal conditions for successful performance of judicial functions, but also the higher courts, which ensure consistent application of law in court practice. Hence, the problem of studying the personality of the judge and evaluation of the effect of personal qualities on the discharge of his functions involves identification, based on the sociological concept of personality, of those qualities of a person, which are appropriate for such a career and facilitate duties of office[1]. The foregoing

[1] Грошевой, Ю. М. Проблемы формирования судейского убеждения в уголовном судопроизводстве [Текст] / Ю. М. Грошевой. – Харьков: Высш. шк., 1975. – 144 с. – С. 35.

highlights the importance of ensuring that the judicial system is staffed with professionals that best fit the requirements to the judicial profession. The study of personal characteristics of the judge is of a great practical value since it provides the theoretical foundation for legislative effort to enshrine qualification requirements set for both judicial candidates and serving judges. For a person already conferred the status of a judge should keep on professional development and must work towards self-improvement, master his or her skills, promptly adapt to changes and keep up with the requirements of the time. So, the objective of judicial anthropology should be the study of the personality of the judge combined with the analysis of the content of his professional activity in order to identify those of his qualities that benefit his profession in terms of efficiency and successful performance. This analysis should result in the elaboration of Standards of compliance with judicial profession that can serve as objective criteria to evaluate the proficiency of candidates for judicial, administrative positions, serving judges when making decisions regarding their transfer to the higher court, etc.

From our point of view, the structure of the Standards of compliance with judicial profession should feature requirements as to: (a) personal level of intellectual development, (b) personal social and psychological qualities and abilities, and (c) level of legal culture. The Standards should be set based on the activity and personality method, while their content should embody professionally important qualities of the judge. The Standards of compliance with the position of judge of the court of appeal, the highest specialized court or the Supreme Court of Ukraine as well as the Standards of compliance to administrative position in court should form a part of the general standards.[1]

As far as improvement of the procedure of selection of judicial personnel is concerned, we believe that the main problem here is the actual steps to implement proclaimed intention to ensure the functioning of the system of judicial selection based on professional qualities and objectivity. A comprehensive research is required to identify acceptable methods of evaluation of qualities and skills of the judge crucial for his office, outline the range of entities that may conveniently handle the task as well as to set the selection stage, where such evaluation must be applied.

As regards improvement of control of the competency of judges, after abolishment of the concept of judges competency evaluation the mechanism to control due qualification of judges is primarily based on the concept of advanced training, with the concept of disciplinary action serving this purpose in extraordinary cases. Under effective Ukrainian

[1] Наприклад, у США існує Перелік критеріїв якостей, за якими оцінюється відповідність кандидата судовій посаді, на яку він претендує. Визначено перелік якостей загальних, а також додаткових якостей окремо для суддів першої інстанції, апеляційних судів та наглядових суддів. – Див.: Критерії оцінки [Текст] // Інформ. вісн. Вищої кваліфікац. коміс. суддів України. – 2008. – № 1. – С. 15–23.

laws advanced training is a *right* of the judge that can be exercised by way of either participation in associations of judges or relevant training (Ch. 2 and 3 Art. 54 of the Law «On Judicial System and Status of Judges»). Peculiarly enough, the Georgian legislation, for example, provides that «failure to complete the special training course stipulated by law within the specified dates and without any good reason shall constitute grounds for dismissal of the judge.» However, in its Opinion No. 4 (2003) on appropriate initial and in-service training for judges at national and European levels dd. November 27, 2003 the CCJE emphasized that «it is unrealistic to make in-service training mandatory in every case, since, from its point of view, «the fear is that it would then become bureaucratic and simply a matter of form» (Cl. 34). The CCJE stressed that it is necessary to disseminate a culture of continuous training in the judiciary (Cl. 33)[1]. With due respect to this comment, we would rather believe that the said *culture* should be *instilled*, which is only possible under conditions of training, either continuous or recurrent. We suggest that the right of the judge for further training be substituted for his or her ethical duty, which will contribute to the establishment of the institution of further training as an element of monitoring of competence of judges. In addition, to ensure a uniform policy in respect of professional level of judges the Concept of further training of judges should be developed. It should provide for its goals, forms of implementation, timing, recurrence, form of monitoring if the course was successfully completed, and most importantly – the consequences should the results prove unsatisfactory.

Effective national legislation, unfortunately, does not provide grounds for dismissal of a person as a judge for the reason of his or her professional incompetence. We believe that failure to pass the test at the end of the training program must be an indicator of professional incompetence of a judge. If it is to be enshrined in law by legislative amendment that further training is nothing but *ethical duty* of the judge, this may offer a good reason for dismissal of the incompetent judge on the grounds stipulated in Par. 5 Ch. 5 Art. 126 of the Constitution of Ukraine – violation of the judge's oath of office. This Article implies that a judge must exercise his or her duties honestly and in good faith (Ch. 1 Art. 55 of the Law of Ukraine «On the Judicial System and Status of Judges»). For these reasons further training will become an effective mechanism to monitor competency of judges and compliance of their qualification to requirements of the profession.

As regards judicial discipline as a mechanism to monitor competency of judges, according to Cl. 18 of the Basic Principles on the Independence of the Judiciary, judges shall be subject to suspension or removal only for reasons of

[1] . Висновок №4 (2003) Консультативної ради європейських суддів до уваги Комітету Міністрів Ради Європи щодо належної підготовки та підвищення кваліфікації суддів на національному та європейському рівнях [Текст]: Страсбург, 27.11.2003 р. // Міжнародні стандарти в сфері судочинства. – К.: Істина, 2010. – С. 115–120.

incapacity or behavior that renders them unfit to discharge their duties. In our opinion, inappropriate level of qualification of a judge forms a reason that implies undermining the credibility of justice, the judicial power as a whole. However, inappropriate level of qualification of a judge must be proven. The status of judges guarantees application of objective criteria to evaluate his or her professional competence to hold the office. In our view, the only possible mechanism for such evaluation available within the existing legal framework is final testing of judges upon completion of the advanced training course. Only negative result of the test can be an objective evidence of his or her professional incompetence. Unfortunately however, the legislation does not contain a provision that would allow the High Qualification Commission of Judges may adopt a decision to send a judge into a further training program based on the results of disciplinary proceedings. The feasibility of amendment of the Law of Ukraine «On the Judicial System and Status of Judges» by adding such a provision is justified by the following: (a) it will facilitate the introduction of objective criteria for evaluation of conduct of judges; (b) it will help to increase proficiency (qualification level) of judges; (c) it will not violate guarantees of autonomy and independence of judges; (d) it will create conditions for application of disciplinary procedure as an additional tool to control the level of competence of the judiciary. So, in general, these measures will contribute to higher professional level of judges and, hence, better efficiency of the justice system.

And finally, here are some considerations concerning improvements of the mechanism of judicial administration. The judicial system as an integral and self-sufficient organization cannot be considered truly effective, if it has no powers or possibility to independently run its activities (exercise administration). Provision of resources for administration is the timely provision of courts with the necessary resources of adequate quality and quantity («adequate resources «), establishment of effective procedures for their distribution, accounting and control. One can envisage several variants of judicial administration: In the first variant, the system may encompass several «structural units», with competence to manage resources distributed among them (for example, when courts are in charge of financial, material and technical resources, the High Qualifications Commission of Judges is responsible for human resources, and the highest judicial agencies – for the information). However, in order to ensure the integrity of such system of judicial administration, the integrity of the judicial system administration policy, one should assign a single coordinating body of the judicial administration system (to ensure the principle of effective management – unity of direction) to be endowed with powers to coordinate, control, development of a concerned strategy for resources management, prompt operational managerial decision-making and so on. We believe that this task can be imposed

on the Council of Judges of Ukraine and the council of judges of specialized jurisdiction, which is hierarchically subordinate to it. This model can be quite feasible, provided minor changes and additions to the Law of Ukraine «On the Judicial System and Status of Judges».

Another option, and a more radical one, is to create within the structure of the Supreme Court of Ukraine a separate unit to be conferred the power of judicial administration. This model, in our view, has several advantages over the previous one: Firstly, it will strengthen the position of the Supreme Court of Ukraine as the highest judicial institution in the system of courts of general jurisdiction; secondly, it will allow to focus exclusively on management activities, which will contribute significantly to increase its professionalism, quality of management decisions; thirdly, it will allow to focus handling of all issues of organizational support of the judicial system in a single center, thus creating conditions for an effective, consolidated strategy of development for the judicial system; fourthly, it will allow to save financial resources, which under the first model are needed to maintain all structural units of the system of judicial administration; fifthly, for more effective implementation of managerial decisions of this body and establishment of feedback with individual elements of the judiciary, the lower courts will also have separate divisions formed in them, with their duties to include operational management of distribution, coordination, accounting and control of organizational provision of the courts with the necessary resources. However, the implementation of this variant of organization of the system of judicial administration requires substantial changes in legislation and is to be preceded by creation of a new concept of judicial administration.

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