

UDC 347.96(477)

CURRENT ISSUES ON THE FORMATION OF THE JUDICIARY IN UKRAINE**Slobodianyuk N.S.**

National University «Odessa Law Academy»

Strategy analysis of judicial reform of authorities, as well as some other ways of its improvement gives us a possibility to anticipate possible changes in the process of formation of the judiciaries. In view of recent development of the reforms, questions of present interest are related to quality of justice, overall performance of judicial authorities, as well as efficiency of each judge as a judicial power holder. At present, extremely important are questions concerning competent evaluation of judges, carried out to determine professional level and skills of each judge, along with qualification of quality of justice in general. Among key aspects needed to improve juridical branch and establish credibility of the justice, are questions of strengthening of the judicial power authority, making it closer to public society and, at the same time, assuring principle of independence to the full. Therefore, questions of formation of judiciary establishment with direct public involvement into the process may be considered in the context of the changes implemented to the Constitution of Ukraine and judiciary branch reform.

Keywords: judicial authorities, justice efficiency, competent assessment of judges, judge's file, elective judiciary.

Problem formulation. At the present point of time formation of Ukraine as sovereign, independent, democratic, social, and law-governed state is accompanied by profound changes and overall reforms induced by a desire to bring up to date national legal system and its elements, bring national legislation in compliance with international and European legal traditions, as well as create most comfortable environment for maximum performance of democratic institutions, close cooperation of the state and public society.

Within the context of reform processes judicial modernization is playing important part. It is fair to mention, that most of the changes in judiciary field are call of the times and aim at provision of conditions for independent, just, unprejudiced and unbiased court, along with assured access to justice for natural and legal entities, favourable conditions for full realization of rights for judicial remedy, which undoubtedly aims at implementation of the supremacy of the law. Needless to say, that creation of a court with maximum performance is impossible without modern improvement and democratic transition of an order for judiciary establishment formation. Due to that fact, there is a profound necessity for reasonable and precise steps focused on regulation of the process of judge's seat election and dismissal, particularly but not exceptionally, confirm fundamental legal principles for implementation of people's right to complete the judiciary at the level of constitutional law of Ukraine.

Analysis of recent researches and publications.

Current issues on the formation of the judiciary were analyzed by the following national and foreign scientists: V. Bernhem (В. Бернхем), V.S. Bihun (В.С. Бігун), V.V. Dolezhan (В.В. Долежан), V.M. Campo (В.М. Кампо), S.V. Kivalov (С.В. Ківалов), M.I. Koziubra (М.І. Козюбра), V.V. Kopeichikova (В.В. Копейчикова), D. Midora (Д. Мідора), L.M. Moskvich (Л.М. Москвич), I.V. Nazarov (І.В. Назаров), A.O. Selivanov (А.О. Селіванов), Y.Y. Polianskyi (Ю.С. Полянський), S.V. Prylutskyi (С.В. Прилутський), L. Fridman (Л. Фрідмен), B.A. Futey (Б.А. Футей), and others.

Unresolved issues of the problem. Never the less, it has to be mentioned, that the problem of

formation of the judiciary directly by the public is not properly analyzed in general.

The purpose of the article. Discover several current issues related to improvement of the effectiveness of the justice and strengthening of the judicial power authority, including formulation of perspectives to solve above mentioned problems and analyze within the given context possibilities of election of judges directly by the public.

Main material. Implementation of any judicial reform is only justified with a single purpose to have functional national system of justice, in compliance with international and European legal standards, which is able timely and sufficiently react to social and economic challenges in the society. There is a certain difficulty in solving the above mentioned problems, caused by enormous number of concurrent issues, including necessity to increase law effectiveness, establish credibility of the justice, revision of powers, goals and functions of the public within the process of implementation of justice, concerning the structure and the logic of its implementation, in particular.

All of the above mentioned, pretty much applies to measures of judicial and legal reform, which are implemented during the last years, considering that re-thinking of general problems of formation of the judiciary establishment, as well as introduction of fundamental changes in the field of judicial and legal reform is accomplished with introduction of the Law of Ukraine "On judicial system and status of a judge" [1]. This in turn encouraged improvement of the legislation of Ukraine regarding judicial system, core essence of which was incorporation of significant number of progressive standards to official Law of Ukraine "On judicial system and status of a judge". Those standards were proven over time with practical usage and caused a necessity to outline new framework for reforms.

With implementation of the Law of Ukraine "On ensuring the right to a fair trial" [2], new set of measures for improvement of national judicial system was initiated, which included: implementation of transparent and thoroughly regulated order for appointment as a judge, introduction of the institute of judge's file, together with emphasis on the formal nature of the role of the President of Ukraine

in appointment of judges on five years' period for the first time, etc. Main focus of the above described changes is directed to approach, when the career of a judge actually depends on his objective virtues, professional and moral standards.

As emphasized by the European Commission for Democracy through Law (Venice Commission) and Human Rights Directorate for The Directorate General of Human Rights and Rule of Law of the Council of Europe in Joint Decision from 23rd of March, 2015, by the number № 801/2015 [3], for successful implementation of judicial reform in Ukraine, which will comply with European standards, it is necessary to introduce changes to the Constitution, in particular: it is required to suspend the role of the Supreme Council of Ukraine, the Verkhovna Rada, in appointment of the judge permanently or his dismissal; composition of the High Council of Justice of Ukraine should be changed in the manner to ensure that its prevailing part or the majority will comprise of judges, elected by their colleagues; power of the Verkhovna Rada to remove immunities from judges should be terminated, etc.

All of the above mentioned matters of the law have caused whole new approaches in regards to a problem of effective order of formation of judiciary establishment, determination of content, legal nature, properties, and classification characteristics of possibility for direct engagement of public information of the judiciary, in particular, to choose on an elective post and revoke appointment of the local judiciary. This all leads us to the necessity of profound and comprehensive investigation of the role of elective judiciary in formation of judiciary establishment for the purpose of further improvement of the order of formation of the judiciary, legal regulation of rights of direct engagement of public information of the judiciary or creation of a model of its own to be used to elect judges in Ukraine. Those measures will encourage an increase in law enforcement effectiveness, transparency of justice and provision of assured access to justice or right to legal assistance.

One of the distinct features of the Law of Ukraine "On provision of right to a fair trial" is also an introduction of the institute of judge's files. Thus, according to the Art. 85 of the Law of Ukraine "On the Judicial System and the Status of Judges", one of the milestones of the competent evaluation of a judge is an analysis of judge's file and an interview.

The analysis of improvement orders to the Art. 85 of the Law of Ukraine "On the Judicial System and the Status of Judges" shows, that among other measures, judge's file should include information on results of the competent evaluation of a judge, as well as periodic assessment for the whole duration of his assignment on the position. However, it should also be mentioned, that the institute of judge's file is new to our legal system, it is the concept, which in general should represent efficacy and productivity of each judiciary power holder's professional activity. Thus, realizing public request for the renewal of the legal system in particular and judiciary establishment specifically, due attention should be paid to the problem of keeping of such a file on judges, synthesis and analysis of

the information on judges, including development of the order and methodology for judges' qualification assessment and the Procedure for holding examinations, etc. Also, if stages of assessment include conduction of anonymous testing or analysis of a dossier file and an interview with a judge, corresponding normative acts should be introduced to control mentioned issues. Such ideas were already introduced during the discussion in Ukraine Crisis Media Centre on a topic of "Reform the Judiciary: current situation and challenges" by the Head of the High Council of Justice of Ukraine Igor Benedisyuk and Serhiy Koziakov, Head of the High Judicial Qualifications Commission of Ukraine [4].

In current version of the Law of Ukraine "On the Judicial System and the Status of Judges" significant attention is paid to the problem of judicial independence (Art. 48, 49). For instance, among everything else, article 48 of this Law points out, that "judicial independence is provided with immunity and inviolability of a judge" [1].

This approach can be justified at the very least by the fact, that following European values and aiming at development in relevant direction, the State should not only declare provisions of corresponding international principles of law, but also follow them, as independence of justice is not a whim of the judges themselves, but a warranty to ensure the supremacy of the law, legally protected interests of persons and corporate entities, society and the State at large.

Other sides, the principle of "inviolability of a judge", ensured by the legislation as a way of provision of the independence of justice from the State on national level, and should not be substituted for impudence or abuse of a position of a judge.

At the same time, in p.58 of the Joint Conclusion from 23rd of March, 2015, by the number № 801/2015 expressed by the Venice Commission and Human Rights Directorate (HRD) for The Directorate General (DG-I) of Human Rights and Rule of Law of the Council of Europe in regards to the Law "On judicial system and implementing of changes to the law "On the High Council of Justice of Ukraine", it is pronounced, that in reference to general inviolability of a judge, the Venice Commission consistently speaks against assigning of immunities falling outside the limits of the functional immunity. On top of that, the Venice Commission on more than one occasion stated, that consent of the Verkhovna Rada of Ukraine to cancel inviolability of a judge is not appropriate decision to the problem, as in this situation, political body will be used to decide on the status of judges and their immunity. As a result, competence of cancelation of inviolability of judges should belong not to the political body, as the Verkhovna Rada of Ukraine, but to the truly independent judicial authority [3].

In efforts to bring the system of judicial authorities, responsible for the formation of the judiciary establishments in Ukraine, to international standard in regards to representation of judges in such authorities and the system of their election on legislative level. The problem of election of such authority members by judges was resolved to extend provided by the provisions of the Fundamental Law of Ukraine.

In addition to all of the stated above, after the analysis of provisions of the draft law of Ukraine “On provision of right to a fair trial” Venice Commission and Human Rights Directorate for The Directorate General of Human Rights and Rule of Law of the Council of Europe concluded, that the most difficult problems, related to independence of the judiciary authorities in Ukraine, lay in constitutional provisions. For the successful implementation of judicial reform in Ukraine, which will comply with European standards, it is necessary to introduce changes to the Constitution, in particular: it is required to suspend the role of the Supreme Council of Ukraine, the Verkhovna Rada, in appointment of the judge permanently or his dismissal; composition of the High Council of Justice of Ukraine should be changed in the manner to ensure that its prevailing part or the majority will comprise of judges, elected by their colleagues; power of the Verkhovna Rada to remove immunities from judges should be terminated; power of the President of Ukraine to form or terminate courts should be removed from the Constitution [3].

These days, among important issues raised by scientists and public officials on improving of the legal system and further improvement of the order of formation of the judiciary, there are questions of necessity of dismissal of all the judges of Ukraine and election of the new on the vacant positions. Specifically, in Transient provisions of the draft law of changes to the Constitution of Ukraine, in the section of the system of justice it is provided, that the powers of a judge, assigned for the first time, before coming into effect of the law of Ukraine “On implementing of changes to the Constitution of Ukraine” (regarding the system of justice), are terminated with the end of the term, for which he was assigned on the position. Judges, elected on the position permanently by the date of coming into effect of the law of Ukraine “On implementing of changes to the Constitution of Ukraine” (regarding the system of justice), continue to exercise the powers till dismissal or termination of their authorities, by reasons determined by the Constitution of Ukraine with due consideration of changes implemented with the law of Ukraine “On implementing of changes to the Constitution of Ukraine” (regarding the system of justice) [5].

Overall, the Venice Commission approves the draft law on changes to the Fundamental Law, in particular, those concerning termination of powers of the Verkhovna Rada of Ukraine to elect judges, cancellation of probation period for newly appointed judges, removal of “violate an oath” from reasons for dismissal of judges from positions [6].

At the same time, in regards to norms of the draft law on dismissal of all of the acting judges, it is important to point out, that dismissal of all judges will not comply with European standards and the principle of the supremacy of the law.

When speculating on usefulness of the re-election of all judges with no exception, as it was done in Bosnia and Herzegovina, for instance, M. Kozyubra noted, that more useful is requalification, rather than dismissal. The scientist states, that it might be introduced to Transient provisions, that everyone should be reassessed, as well

as determine who will provide such a requalification. According to his views, it is necessary to do so, but not until new qualification requirements for judges and for assignment to the positions in the supreme authorities will be set specifically in the Constitution [7].

At present moment of time, articles 88-89 of the Law of Ukraine “On provision of right to a fair trial” determine goals and order of periodic assessment of judges and provide that results of the periodic assessment may be considered during approach to a problem of permanent election of a judge or holding a competition for taking a position in a respective court [2].

As mentioned by the representatives of the Ukrainian Bar Association during the meeting of discussion board “Effective justice”, held within a framework the meeting named “Legal reform as seen by a judge”, one of the approved draft laws on the changes to Constitution in “Transient Provisions” contains a mechanism of so called “judiciary cleanup”. It provides three parts of reassessment or examination of judges: professional, social, and personal. It is also emphasized, that correlation between assessments, suggested to be introduced to the Constitution, and assessment, which can start in the soonest possible time as specified in the law “On provision of right to a fair trial”, at this stage is not determined [8].

For the purposes of changes, aiming at renewal of the judiciary and making it closer to public, it is necessary, on the level of the Constitution of Ukraine, secure people’s right to take part in formation of the judiciary establishment. For this purpose, it is necessary to refer to American experience. In this attitude, Daniel John Meador said, that in the USA lawyers turn into judges in of the four following ways: a) through assignment by the Supreme Executive power, providing his candidacy was affirmed by the legislative authorities; b) through selection by execution officer from the list of several applicants, submitted by an independent board; c) through general election process; d) through election in legislative authority. At the same time, time periods of the assignment of the judges on positions varies considerably for different systems, beginning with several years, e.g. four or six, sometimes up to twenty or fifteen, and upon condition of “proper behaviour” – “for lifelong period” [9].

In general, there are three main methods of selection of Supreme Court Justices, dominant across the whole country: through competitive elections, appointment by the Senate and The Missouri Plan. Scientists agree, that more useful are elections of judicial of the lower branch, than the Supreme Court Justices [10].

Describing systems of judicial election William Burnham says, that in many states elections of judges are based on the concept that the judge, as any other office holder, executing functions of authority in democratic society, should respond in front of a public [11].

Analyzing the judicial electoral process in different states of the USA for the period of several years in a row, modern American scientists insist, that review of recent election of judges shows heredity, slight changes, and considerable fluctua-

tions, especially on the regional level. For instance, voters continue regular support of all judges, recommended by existing system for assessment of effectiveness of judicial activity (e.g., Alaska, Arizona, and Colorado). Nevertheless, sometimes voters can refuse to support any of the candidates, and in some cases they can vote for dismissal of a judge from the judicial seat [12].

Conclusions and suggestions. Now it can be seen that approach to “judiciary cleanup”, suggesting dismissal of all of the judges, is unreasonable, as first of all, above mentioned may lead to total imbalance of the functions of judiciary power, in the second place, have negative effect on the quality

of the implementation of justice, as productivity of justice administration requires knowing of not only norms of substantive law but also norms of procedural law, as well as awareness of their practical application. In addition, it is worth mentioning, that making judicial decisions requires moderation and balance, not loud appeals and claims, or destructive rushed decisions, and eliminates any possibility of any form of pressure. In this perspective, it seems productive to implement judicial elections, which will benefit to, first, reform the judiciary in a democratic way, and second, – removal of social tensions, caused by permanently important questions of judicial election and their dismissal from position.

References:

1. Pro sudoustrii ta status suddiv : Zakon Ukrainy vid 07.07.2010 r. № 2453-VI // Vidomosti Verkhovnoi Rady Ukrainy. – 2010. – № 41-42, № 43, № 44-45. – St. 529.
2. Pro zabezpechennia prava na spravedyvyi sud : Zakon Ukrainy vid 12.02.2015 r. № 192-VIII // Ofitsiyni visnyk Ukrainy. – 2015. – № 17. – St. 447.
3. Spilnyi vysnovok № 801/2015 Venetsianskoi komisii i Dyrektoratu z prav liudyny (DPL) Heneralnoho dyrektoratu z prav liudyny ta verkhovenstva prava Rady Yevropy (HD-I) shchodo Zakonu «Pro sudoustrii i vnesennia zmin do zakonu «Pro sudoustrii i status suddiv» i vnesennia zmin do Zakonu «Pro Vyshchu radu yustytysii» Ukrainy [Electronic source]. – Access mode: URL: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)007-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)007-e) Spilnyi vysnovok № 801/2015 Venetsianskoi komisii i Dyrektoratu z prav liudyny (DPL) Heneralnoho dyrektoratu z prav liudyny ta verkhovenstva prava Rady Yevropy (HD-I) shchodo Zakonu «Pro sudoustrii i vnesennia zmin do zakonu «Pro sudoustrii i status suddiv» i vnesennia zmin do Zakonu «Pro Vyshchu radu yustytysii» Ukrainy [Electronic source]. – Access mode: URL: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)007-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)007-e) (p. 92)
4. Mekhanizm dlia onovlennia suddivskoho korpusu stvoreno [Elektronnyi resurs]. – Access mode: URL: <http://www.vru.gov.ua/news/1176>
5. Proekt zmin do Konstytutsii Ukrainy v chastyni pravosuddia [Electronic source]. – Access mode: URL: <http://constitution.gov.ua/work/item/id/13>
6. Promizhnyi vysnovok № 803/2015 shchodo zaproponovanykh zmin do Konstytutsii Ukrainy v chastyni pravosuddia [Elektronnyi resurs]. – Access mode: URL: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)030-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)030-e)
7. Koziubra M. Imitatsiia №1 v Ukraini. Sudova reforma [Elektronnyi resurs]. – Access mode: URL: http://lb.ua/news/2015/07/09/310419_imitatsiya_1_ukraini_sudova_reforma.html
8. Hres O. Aby zakonnykiv ureshhti-resht pochuly, vony hotovi debatuvaty v priamykh efirakh ta provodyty vlasni statystychni doslidzhennia [Elektronnyi resurs]. – Access mode: URL: http://zib.com.ua/ua/119796-abi_suddiv_vreshhti_pochuli_vony_gotovi_debatuvati_u_pryamih_.html
9. Sudy v Spoluchenykh Shtatakh / Daniel Dzhon Midor. – Sent-Pol: Vest Pablichinh Ko, 1991. – S. 52-53. (85 s.)
10. The Missouri Plan in National Perspective / Stephen J. Ware // Missouri Law Review, December 3, 2009, Vol. 74, 2009, r. 772. (rr. 751-775)
11. Bernam U. Pravovaia sistema SShA. 3-i vypusk / Uyliam Bernam; nauch. red. V.A. Vlasykhyn; per. s anhl. A.V. Aleksandrov y dr. – M.: Novaia yustytysia, 2007. – S. 318. (1216 s.)
12. Judicial retention election trends 1964-2006 / by Larry Aspin // JUDICATURE. – Volume 90, Number 5 March-April 2007. – R. 213. (pp. 208-213)

Слободяник Н.С.

Національний університет «Одеська юридична академія»

ДЕЯКІ АКТУАЛЬНІ ПИТАННЯ ФОРМУВАННЯ СУДДІВСЬКОГО КОРПУСУ В УКРАЇНІ

Анотація

Аналіз стратегії реформування судової влади та деяких напрямків її вдосконалення дозволяють спрогнозувати можливі зміни і в порядку формування суддівського корпусу. У світлі останніх реформаційних процесів актуальними є питання якості правосуддя, ефективності функціонування судової влади та продуктивності кожного судді як носія судової влади. Наразі питання кваліфікаційного оцінювання суддів з метою визначення професійного рівня та кваліфікації кожного судді, а також якості відправлення правосуддя в цілому є дуже актуальними та потребують уваги. Серед ключових аспектів вдосконалення судової влади та утвердження довіри до правосуддя є питання підвищення авторитету судової влади, її наближення до суспільства та одночасно максимального забезпечення принципу незалежності. Відтак, питання формування суддівського корпусу та безпосередньої участі народу у цьому процесі може бути розглянутим у контексті змін до Конституції України та реформуванні судової влади.

Ключові слова: судова влада, ефективність правосуддя, кваліфікаційне оцінювання судді, суддівське досвід, виборність суддів.

Слободяник Н.С.

Национальный университет «Одесская юридическая академия»

НЕКОТОРЫЕ АКТУАЛЬНЫЕ ВОПРОСЫ ФОРМИРОВАНИЯ СУДЕЙСКОГО КОРПУСА В УКРАИНЕ

Аннотация

Анализ стратегии реформирования судебной власти и некоторых направлений ее совершенствования позволяют спрогнозировать возможные изменения и в порядке формирования судейского корпуса. В свете последних процессов реформирования актуальными являются вопросы качества правосудия, эффективности функционирования судебной власти и производительности каждого судьи как носителя судебной власти. Сейчас вопрос квалификационного оценивания судей с целью определения профессионального уровня и квалификации каждого судьи, а также качества отправления правосудия в целом являются весьма актуальными и требуют внимания. Среди ключевых аспектов совершенствования судебной власти и утверждения доверия к правосудию является вопрос повышения авторитета судебной власти, ее приближения к обществу и одновременно максимального обеспечения принципа независимости. Поэтому вопросы формирования судейского корпуса и непосредственного участия народа в этом процессе может быть рассмотрен в контексте изменений в Конституцию Украины и реформировании судебной власти.

Ключевые слова: судебная власть, эффективность правосудия, квалификационное оценивание судей, судейское досье, выборность судей.

UDC 343.13

REGULATIVE AND LEGAL INFLUENCE OF TERMS IN THE STAGE OF PREPARATIVE AND ASSIGNMENT OF COURT HEARING

Soldatskyi V.V.

National University «Odessa Law Academy»

The preparatory stage of production is independent of criminal proceedings in which the judge examines the criminal case, the adequacy of reasons for the appointment of the court session, and solves issues related to the preparation of the case for trial. At this stage of criminal proceedings, to date, there are some gaps that can only fill regulations change legislation.

Keywords: preparative court procedure, court hearing, stages in criminal process, terms in criminal process.

Statement of problem in the general view and its connections with important scientific and practical tasks. Criminal and Procedural Code of Ukraine essentially reformatted the stage of court procedure preparation with the purpose of justice performance at the base of competitiveness and procedural equality of parties in the criminal procedure. In this reason, the realization of temporal aspects in competitive principles in preparative court procedure needs the conceptual research because the actions are made by judge at this stage of criminal process are the guarantee, validity, objectivity of a sentence that, certainly, get a great importance for the parties of prosecution and defence. Judge appraises proves from the point of view of their sufficiency for rendition guilty or not guilty verdict in the future stage of case consideration [1, p. 165].

It's necessary to note, that during the competitive principles, court must to create the correspond conditions for performance procedural commitments and realizing of given rights by parties and to ensure the levels of procedural and legal opportunities of upholding and proof of own position in criminal case to the members of process.

In the same time, the equal opportunity to participate in the consideration of questions is solved in the preparative of court hearing must be given to the parties. Preparative procedure is the independent stage of criminal process where the judge checks the materials of criminal case about the existence of reasons for the assignment of court hearing and solves the questions are connected with preparation of case to the court consideration (art. 314, 315 Criminal and Procedural Code of Ukraine).

At this stage it's performance the activity by judge which is directed to the defining the existence and absence of problems with the consideration of the essence of criminal case. This activity in correspondence to the central stage of criminal process of court hearing is preparative, that's why it's important to performance of the case without unreasonable interruption as right realization of every accused person into the reasonable time and ensuring as fast access of complainant to justice. In a way, it's appeared the objective necessity of legal regulation in the activity of judges in this stage with the help of establishing in the statutes of the law the terms of decision formulation and making of procedural actions.