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CERTIFICATION TRAINING OF JUDGES AS THE WAY TO PREVENT JUDICIAL ERRORS IN CIVIL PROCEEDINGS OF UKRAINE

One should not only remove legal errors, but also try to prevent their occurrence in general. In our opinion, one of the measures how to prevent a miscarriage of justice in civil proceedings is certification training of judges.

Effective implementation tasks for execution of justice can only be performed by a person with the appropriate level of professional training. Judges must take effective measures to preserve and expand their knowledge, improve practical experience and personal qualities that are necessary for proper performance of their duties, using teaching aids and other opportunities that are available for them.

These forms of certification training of judges were highlighted and analyzed: 1) self-study; 2) permanent workshops and scientific conferences of judges; 3) training; 4) education and training at the National School of Judges of Ukraine; 5) attestation. The experience of European democracies on the attestation of judges was investigated.

Key words: prevention, evaluation of judges, certification training, professionalism, judicial errors, civil proceedings.

A need for formation and fixation of fundamentals of the legal state, which Ukraine is proclaimed according to the Constitution of Ukraine, set a complicated task before Ukrainian society to create an efficient and consistent legal system which is able to ensure a priority of generally recognized person's rights and freedoms. The legal system efficiency is one of the various problems which nowadays became especially acute for entire Ukrainian state and legal system particularly. The mentioned challenge is also relevant for Ukrainian judicial authority, including those branches, which execute civil justice. Hence, currently not only it is really urgent to provide access to the justice, but also to ensure accessibility exactly to the efficient justice.

It is precisely this problem that actually demands reasoning of courts activity and identification of civil justice delivery rate. Only in such a way it may be possible to determine the efficiency of civil justice in Ukraine and to ensure the reduction of judicial errors.

Not only the judicial errors must be removed, but also prevented. Prevention of judicial errors in civil justice, in our opinion, may be performed by using different measures, one of which is the proficiency enhancement of judges.

The theoretical background of the research are the works of the following scientists: I. Voitiuk, S. Ivanitskyi, N. Kuznetsova, I. Marochkin, L. Moskvich, O. Rusanov, I. Samsin, L. Skomoroha, N. Shuklina and others.

This article is aimed at identification and research of the forms of judges proficiency enhancement, which may positively impact on the prevention of judicial errors in civil justice of Ukraine.

In circumstances of frequently changed legislation in Ukraine, the requirements to the judges' professional knowledge are raised considerably. Not only they have to know the law, practice of its application, but also to master tactics and methods of civil action proceedings, to carry out their professional duties in a competent manner and impartially. The high standard of judges' professionalism is a cornerstone of judicial system qualitative functioning.

The abovementioned circumstances require substantial improvement of judges professional preparation, which is the most important element influencing the promptness and correctness of court judgments. Certainly, the justice may be efficiently executed only by those persons who possess appropriate level of professional preparation.

The judges should take effective measures for preservation and broadening of their knowledge, improvement of experience and personal qualities needed for proper execution of their duties, using available teaching techniques and other opportunities. The judge should adhere to the international

legislation, including international conventions and other documents ratified by the Verkhovna Rada of Ukraine, as well as to the practice of the European Court of human rights.

It is deemed advisable to distinguish the following forms judges' professional training and development:

1) self-study. This form of proficiency enhancement is relevant for all judges irrespectively to the occupied positions and period of work. This is the most meaningful form of study which is exercised by each judge independently.

Self-study organization and performance depend from arrangement of the activity in the court, as well as from the attention of courts' chiefs to this issue. The self-study is carried out according to the plans drafted by the judges and approved by the chief of the court. Each judge independently determines the subject for self-study taking into consideration his/her professional and service interests;

2) permanent workshops and scientific conferences of judges. Workshops are held for learning the methodology of court proceedings in certain cases (disputes), as well as for sharing experience of judges' work, discussion of judicial practice consolidations and for other matter. As a rule, the judges of local courts, appeal courts, advocates and other practitioners in law, managers and officials from the state authority, as well as scientists, are invited to the workshops.

Scientific conferences are held at the level of appeal courts and court of cassation. The actual issues of courts activity, theoretical and practical legal matters are presented for consideration at the conferences.

Usually, conferences are held under participation of judges, lawyers-scientists, prosecution officials and representatives of other law enforcement authorities led by the chief of corresponding court with participation of both judges of appeal courts or specialized courts and local courts judges¹;

3) training is a gaining of experience in execution of tasks and duties of certain specialty. Training provides for learning of the best domestic and foreign practices, acquisition of practical skills and knowledge on competence performance at occupied position or at the position of higher rank.

In the majority of cases the judges from local courts are sent to the appeal courts for training to upgrade skills. Training is an off-the-job and short term event;

4) education and proficiency enhancement at the National School of Judges of Ukraine (hereinafter – NSJU). The leading role in the professional development system and judges' education plays the NSJU. This is a state institution with special status in the system of justice which provides preparation of high qualified personnel in the system of justice and conducts scientific research.

The NSJU acts according to the Constitution of Ukraine (chapter VIII 'Justice'), the Law of Ukraine 'On the Judicial System and Status of Judges' as of 2 June 2016, the Statute of the NSJU and other legal acts. According to the Law of Ukraine 'On the Judicial System and Status of Judges' dated on June 2nd, 2016, the judge is obliged to undergo the preparation for proficiency maintaining in the NSJU. The judge shall pass the preparation for proficiency maintaining not less than once in three years. Duration of such preparation cannot be less than 40 academic hours within each three years of the judge tenure. The NSJU organizes studies for judges for proficiency maintaining in accordance with the need for improvement of their knowledge, skills and expertise depending from the judges' experience, level and specialization of the court where they work, as well as taking into consideration their personal demands. For this reason within study program the NSJU organizes compulsory training and training which may be chosen by judge in comply with his/her needs².

Judges are required to adhere to the procedure and etiquette during proceedings, behave oneself patiently, worthily and with a due respect to the parties of the trial, witnesses and other persons of judge's formal communication. For this reason, it is worth to introduce to the judges special preparation training calendars and their periodic study on proficiency enhancement the courses on fundamentals of professional ethics, conflictology, as well as to deliver regularly actual special courses for judges on legislation amendments or correspondently on problematic issues of disputes resolution³;

5) attestation. Procedure of qualified evaluation of judges was introduced only in 2015 after adoption of the Law 'On ensuring the right to a fair trial'. The judges who aspire at the position of judge, and the

¹ Підвищення кваліфікації суддів та працівників апарату суддів. *Радник. Український юридичний портал*. <<http://radnuk.info/pidrychnuku/sydovi-orgonu/500-sydi/10420-s-3>> (2016, листопад, 22).

² Закон про судоустрій та статус суддів 2016 (Верховна Рада України). *Офіційний сайт Верховної Ради України*. <<http://zakon3.rada.gov.ua/laws/show/1402-19>> (2016, листопад, 22).

³ Вороняк, А.С. Підвищення кваліфікації та навчання суддів. *Судова влада України*. <<http://vl.arbitr.gov.ua/sud5004/137849>> (2016, листопад, 22).

judges who wish to be promoted to a position in other court, including the higher instance, are liable for attestation.

Not only the attestation may serve as a ground for promotion, but indeed be a reason for the dismissal of a judge if he/she obtained a too low grade. Upon evaluation results the judge may be moved to the court of lower level, or to suspend from execution of justice and send to the NSJU for upgrade training course after which the judge is to be evaluated again for confirmation of sufficient competence for justice execution.

According to the law, the High qualified commission of judges of Ukraine is responsible for attestation process. As well, legislation provides for ranking in attestation. Primary, the judges of the Supreme Court of Ukraine and other higher specialized courts have to pass attestation. The second in the queue are the judges of appeal courts who have to undergo a proficiency examination within two years after enforcement of the Law of Ukraine 'On ensuring the right to a fair trial'. Also, the attestation is prior for all judges who at the moment of the Law's enforcement have applied for and aspire to the position of a judge life-long.

Taking into account that number of judges in Ukraine amounts to 9 thousands, it is not difficult to guess that proficiency examination and evaluation is a long-lasting procedure. Considering that attestation process was started much later than it is supposed to, it is hopeless to expect that proficiency examination is going to be qualitative.

At the same time it should be stressed that practice of European democracies does not know such instrument of attestation for acting judges, as examination.

According to the European standards the 'judges work evaluation' (attestation) should be targeted at the improvement of judicial system and assurance of its highest quality possible. Such evaluation shall be carried out for the benefit of the society in general. Herewith, the key rule of any personal evaluation of judges should consist in preservation of complete respect to independency of the judicial system during evaluation performance.

Under general rules in legal systems of continental Europe countries the judges' work evaluation (attestation) is not applied to the judges of cassation. Such attestations, apart from few exceptions, also cannot result in dismissal of a judge or application of other sanctions.

Hence, allowing for European standards, qualified attestation shall not be applied to the judges of the highest specialized courts and judges of the Supreme Court of Ukraine. In Ukraine, on the contrary, currently primary the judges of cassation court and appeal courts participate in attestation.

Moreover, whenever judges cannot be evaluated due to the assessment of their decisions. Identification of professional competency has to be performed by assessment (analysis) of professional activity, including professional knowledge. Exactly this constitutes a principal difference between acting judge and candidate for the position of a judge, because the latter does not have the base for such appraisal, namely professional judicial activity.

Formal and informal models of evaluation are applied in the practice of the Council of Europe Member States.

Formal evaluation model foresees the functioning of appraisal authority which membership and competence is stipulated by law. Legislation also determines the purpose of evaluation, applied criteria, evaluation procedure and its eventual consequences, procedural guarantees of judges' rights during performed appraisal. In some countries such formal evaluation are at the competence of courts chairmen or specially authorized judges-peers. Formal system of evaluation prevails (Austria, Belgium, Bulgaria, Estonia, France, Georgia, Germany, Greece, Hungary, Italy, Moldova, the Netherlands, Poland, Romania, Spain and other).

Informal evaluation model do not provide for formalized norms or criteria and, as a rule, have no direct consequences for the appraised judge. Informal evaluation may be performed by discussion, informal gathering of information about the judge, etc. (the Czech Republic, Dania, Finland, Island, Norway, Sweden, Switzerland, Great Britain).

At any model the purpose of evaluation may lay in gaining of the following information:

- about quality of judges work (assessment of achievements and skills, identification of educational needs);
- for taking decision on judges encouragement or promotion;
- to ascertain any elements of remuneration or pension based on the individual performance of a judge;

– for possible further decision regarding judge's discipline, etc.¹.

In the opinion № 17 (2014) of the Consultative Council of European judges on the evaluation of judges' work, the quality of justice and respect for judicial independence dated on October 24, 2014 the following was stated: «Although violations of ethical and professional rules/standards can be considered in the evaluation process, member states should clearly differentiate between evaluation and disciplinary measures and processes... a permanent appointment should not be terminated simply because of an unfavourable evaluation. It should only be terminated in a case of serious breaches of disciplinary or criminal provisions established by law or where the inevitable conclusion of the evaluation process is that the judge is incapable or unwilling to perform his/her judicial duties to a minimum acceptable standard»².

Applied in Europe criteria of evaluation may be divided in two groups: qualitative and quantitative.

The Consultative Council of European judges recommend applying of both groups of criteria.

Quantitative criteria foresee the evaluation of number of cases concluded by the evaluated judge, the time spent on each case and the average time to complete a judgment. In some states the productivity of a judge is measured against a fixed quota (for instance, Spain) or against the average number of decisions handed down by other judges (Germany, Poland).

Quantitative criteria cover the following:

- professional competence (knowledge of law, ability to conduct court proceedings, capacity to write reasoned decisions);
- personal competence (ability to cope with the workload, ability to decide, openness to new technologies);
- social competences (ability to mediate, respect to the parties, ability to lead productive discussion);
- in cases of appointment to administrative positions the administrative experience is evaluated (ability to lead the team and guide it).

Level of judge's analytical capacities and the way in which the judge handles complex cases is considered particularly. In many member states, the number or percentage of decisions reversed on appeal are factors that are considered of great importance in the evaluation process (Greece, Poland, Romania, Spain). In other states (France and Austria) because of the principle of judicial independence, neither the numbers of decisions reversed on appeal nor the reasons for the reversal are taken into account, unless they reveal grave mistakes.

In the practice of European countries the following is considered at evaluation of judges' work: the ability to cooperate with other colleagues, to work in areas of law that are new to the judge and the readiness to take on extra activities within the court's administration such as mentoring and educating recently appointed judges. Organisational skills, work ethic or scholarly activities such as publications and lecturing are also treated as factors for evaluation.

In the Kingdom of the Netherlands there is the quality system (EFQM-model – European Foundation for Quality Management), which consider such criteria as:

- impartiality and fairness of the judge;
- efficiency of work and timeliness of its execution;
- competency (quantity of reversed decision, proportion of cases considered collectively or individually);
- legal solidarity of judges of corresponding court;
- attitude to parties of proceeding.

In European countries the following forms of evaluation are used:

- review of judge's decisions;
- evaluation of statistical data on judge's work;
- attending of hearings where judge is chairing and lead a discussion with him;
- obtaining a document of judge self assessment;
- gathering of other information about the judge (from parties of the process, other judges of this court, judges of appeal court) etc.

¹ Онішук, М. Атестація кадрів: як це розуміють у Європі. Вища кваліфікаційна комісія суддів України. <<http://www.vkksu.gov.ua/ua/about/zmi-pro-komisiu/atestatsiya-suddiv-yak-tse-rozumiut-u-evropi>> (2016, листопад, 22).

² Висновок про оцінювання роботи суддів, якості правосуддя та поваги до незалежності судової влади 2014 (Конституційна рада європейських суддів). Вища рада юстиції. <http://www.vru.gov.ua/content/file/Opinion_17.pdf> (2016, листопад, 22).

Frequency of the evaluation in the practice of European countries varies significantly (France – 2 years, Moldova – three years, Germany – five years, Italy – on differentially every two, eleven and seven years). The Consultative Council of European judges recommends, that judges' performance should not take place too often, however, in order to avoid an impression of constant supervision which could, by its very nature, endanger judicial independence.

European experience proves that evaluation may be of two types:

1) general – which is carried out with different regularity, not for each concrete judge, but for the whole court;

2) special – which is performed when judge aspires to the position in other court or retires from employment due to the family circumstances or for work in state administration.

The attestation results in European countries may be formalized by producing a list of criteria accompanied with records on the level of judge's compliance expressed in grades or percents, or text report, etc.

According to the recommendation of the Consultative Council of European judges the formal individual evaluation of judges should help to improve and maintain a judicial system of high quality for the benefit of the citizens of member states. This should thereby help maintain public confidence in the judiciary. This requires that the public must be able to understand the general principles and procedure of the evaluation process through the procedural framework and methods of evaluation.

However, the individual evaluation process for career or promotion purposes should not take into account the public views on a judge, which may not always be the result of complete or fully understood information. The process and results of individual evaluations must remain confidential and must not be made public.¹

The attestation itself is a positive phenomenon. The judge has to work permanently on his self-improvement and to progress as professional. Under ideal conditions the attestation could enable the identification gaps and shortcomings in the work of judicial authority representatives and preparation of judges. However, the mentioned is applicable in an ideal scenario. In our realities the required attestation turns into the form of repeated qualification examination for judges, which is evidently contradicts to all European standards.

Therefore, the prior task of the state is to ensure functioning of progressive and efficient system of professional development for already acting judges. Continuous preparation of judges has to get them involved, because voluntary participation is the best guarantee of preparation productivity. The advanced methodic for preparation of global and European judges have to be used for judges education. It is crucial to pursue that strengthening and brushing up of knowledge is considered as a moral duty by each judge.

References:

1. Pidvyshchennia kvalifikatsii suddiv ta pratsivnykiv aparatu sudu [Advanced training for judges and court staff]. *Radnyk. Ukrainskyi yurydychnyi portal* [Adviser. Ukrainian legal portal]. <<http://radnuk.info/pidrychnuku/sydovi-orgonu/500-sydi/10420-s-3>> (2016, November, 22). [in Ukrainian].
2. *Zakon pro sudoustrii i status suddiv 2016* [The Law on the Judicial System and Status of Judges] (Verkhovna Rada of Ukraine). *Ofitsiyni sait Verkhovnoi Rady Ukrainy* [Official web-site of Verkhovna Rada of Ukraine]. <<http://zakon3.rada.gov.ua/laws/show/1402-19>> (2016, November, 22). [in Ukrainian].
3. Voroniak, A.S. Pidvyshchennia kvalifikatsii ta navchannia suddiv [Professional development and training of judges]. *Sudova vlada Ukrainy. Ofitsiyni veb-portal* [The judiciary in Ukraine. Official web-portal]. <<http://vl.arbitr.gov.ua/sud5004/137849>> (2016, November, 22). [in Ukrainian].
4. *Vysnovok pro otsiniuvannia roboty suddiv, yakosti pravosuddia ta povahu do nezalezhnosti sudovoi vlady 2014* [The conclusion of the assessment of judges, the quality of justice and respect for the independence of the judiciary] (Konsultatyvna rada yevropeiskikh suddiv). *Vyshcha rada yustytysii. Ofitsiyni sait* [The High Council of Justice. Official web-site]. <http://www.vru.gov.ua/content/file/Opinion_17.pdf> (2016, November, 22). [in Ukrainian].
5. Onishchuk, M. Atestatsiia suddiv: yak tse rozumiut u Yevropi [Certification of the judges, as it is understood in Europe]. *Vyshcha kvalifikatsiina komisiia suddiv Ukrainy* [High Qualification Commission of Judges of Ukraine]. <<http://www.vkksu.gov.ua/ua/about/zmi-pro-komisiu/atestatsiya-suddiv-yak-tse-rozumiut-u-evropi>> (2016, November, 22). [in Ukrainian].

¹ Онішук, М. Атестація кадрів: як це розуміють у Європі. *Вища кваліфікаційна комісія суддів України*. <<http://www.vkksu.gov.ua/ua/about/zmi-pro-komisiu/atestatsiya-suddiv-yak-tse-rozumiut-u-evropi>> (2016, листопад, 22).