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New Stage of Judicial Reform: Expectation and Prospect

June 2, 2016 the Parliament adopted the Law on Amendments to the Constitution of Ukraine on justice that liesrevised constitutional principles of the judiciary and related institutions – prosecutors and advocates. According to the legislator, constitutional changes in terms of justice, should promote the full-scale judicial reform and renewal of the judiciary in accordance with public expectations and in line with European standards, the restoration of public confidence in the judiciary and the proper functioning of prosecution and advocacy. However, certain provisions of the new constitutional provisions contain ambiguous perception and require critical evaluation of potential risk of a buse of the law in making the seimplementing laws. The article is devoted to the critical analysis of the provisions of the saidamendments to the Constitution of Ukraine on justice and speak some proposals for the content of the law, which has to implement the new constitutional principles of justice.

Key words: judicial reform, justice, the Constitution of Ukraine, the change in the administration of justice, the judiciary and related institutions.

Today the judicial system of Ukraine experiences the duty stage of the reformation. The president of Ukraine signed Law of Ukraine "On making alteration in Constitution of Ukraine (in relation to a justice)" (farther – Law) [1] but new Law of Ukraine is "On the judicial system and status of judges" [2]. These events were forecast, in fact as early as the Coalition agreement of Supreme Council of Ukraine from November, 21, 2014 there was the foreseen agreement that "judicial reform

will be conducted by the improvement of positions of Constitution of Ukraine" [3]. On March, 3, 2015 President of Ukraine signed Decree №119/2015 "About Constitutional Commission" [4], in accordance with that a working group was created on preparation of bill in relation to making alteration in Constitution of Ukraine, in particular and in part of justice. With the aim of orientation of work of this organ, President of Ukraine on May, 20, 2015 approved Strategy of reformation of the judicial system, rule-making and contiguous legal institutes on 2015–2020, that sets "priorities of reformation of department judicial – systems of the judicial system, rule-making and contiguous legal institutes both at the level of constitutional changes and at the level of introduction of near-term urgent measures that will provide necessary positive changes in functioning of corresponding legal institutes" [5]. It should be noted that judicial system in Ukraine from a moment acquisition actually consists the state of independence of the state of permanent reformation. As a rule, every reformative event in the field of it took place under the slogans of providing of independence of department judicial, approaching of the national judicial system and rule-making to the international and European norms and standards.So, by Conception judicial legal reform in 1992 provided for this first of all to "guarantee independence and independence of judicial bodies against influence of legislative and executive power, to realize the democratic ideas of justice, worked-out world practice and science". In 2006 by Decree of President of Ukraine the ratified Conception of perfection of judging in order to ratify just court in Ukraine in accordance with Europe. However, as justly establishes O. Khotunska-Nor (Oksana Zinovievna), the steps carried out on the way of achievement of quality changes in the field of the judicial protection of rights and interests of citizens were inconsistent, in a great deal chaotic and groundless. Consequently, judicial reform did not only attain the declared aim but also threatens to turn around results opposite to the put aims [7, 184]. Explanation to it, to our opinion, is simple: a political culture is absent in Ukraine, as every political force, getting power, tries to conduct own judicial reform, not leaning on approved by previous power programmatic to the documents, conceptions. Thus, each time political force tries to build the judicial system in accordance with own vision. However, a department judicial, unlike other branches of power, is apolitical, standards of her functioning are derivatives from a right on a court and already a long ago certain in international documents that declare human rights. Therefore, in this context we again will agree from O. Khotunska-Nor (Oksana Zinovievna), that marks that judicial reform must answer such descriptions, as progressiveness, forecast, purposefulness, scientific validity, flexibility, motivated, richness of content, sequence, irreversibility. Judicial reform must be informatively provided in addition, economically expedient, socially justified and politically coordinated [7, 187]. The new stage of judicial reform complemented its new aims is optimization of the judicial system, judicial procedures and mechanisms of cooperation between judicial government bodies, judicial govern-

ment bodies and institutes that provide realization of justice. So, to the aims of judicial reform the construction of effective model of functioning of the system of justice is added. In addition, in 2016 the low level of trust became the qualificatory sign of judicial reform critically to the department judicial. Therefore, by a strategic aim the increase of trust was certain to the department judicial, in particular by expansion of mechanisms of public inspection, and also decline of level of corruption in the judicial system. In support of these intentions the row of laws was accepted: "About proceeding in a trust to the judicial department" [8], "About prevention of corruption" [9], "About providing of right on a just court" [10], but through normative imperfection of the real acts announced it did not take place by power of desirable and rapid effect of "restart of judicial department". Therefore, President of Ukraine and his command chose more advices radical method is reformation of the system of justice by making alteration in Constitution of Ukraine [1], but as a consequenceis an acceptance of new implementation Law of Ukraine "About the judicial system and status of judges" [2]. Thus, can name the leading principles of the new stage of judicial reform 2016, declared power: approaching of the national judicial system and contiguous legal institutes to the standards and front-rank practices of European Union; it is a construction of the system of justice, able to guarantee realization of right on aobjective court; it is providing of balance of functional and political independence of department judicial and its accountability to the citizens of Ukraine; it is optimization of the judicial system and procedure of rule-making in accordance with the balanced going near principles of availability of justice and cleverness; it is an increase of public trust to the department judicial. Will try to estimate the prospects of achievement of the put aims on the basis of analysis of positions of normative acts, that have them to realize. One of substantial changes absence of determination of the system of the judicial system became in Constitution of Ukraine, and the decision of this question is attributed to adjusting of law (Article 125 Constitution of Ukraine). In particular, the new release of the articles of Basic Law is eliminate position in relation to the presence of county and appellate courts, leaving only a norm in relation to status of the highest court in the system of the judicial system – Supreme Court. Possibility of existence of the higher specialized courts is also fastened without the specification of them subject jurisdiction. If to appeal to practice of European countries in relation to the constitutional adjusting of the judicial system, then it is different, but it is possible to distinguish two basic tendencies: or all courts that operate (or can operate) in the state are remembered, or accented only on a higher court, and in relation to other courts – a constitutional norm sends to the law.But it is possible to define and general conformity to law: the presence of the system of courts, in particular subordinate, is declared almost in all constitutions. To our opinion, an exception from Constitution of Ukraine positions in relation to the presence of county and appellate courts is unjustified and contains a doubt in material well-being in the state of legal definiteness and stability of func-

tioning of one of branches of state power, risk of violation of its independence and independence of its transmitters, potential threat of dependence on will of political power in relation to their existence. Principle of parity of branches of state power requires even attitude toward their constitutional determination. Not having regard to branched of courts, each of them, but not only the highest court, is carrier of judicial department, consider that is why, that the system of organs of one of branches of state power – judicial – must have constitutional determination, even at the level of mention and dispatch to the law. Sufficient reasons authors of Law in part of exception of mention about the presence of the system of subordinates, in particular appeal and local courts, on our persuasion, were not pointed, even if power and plans to change their territorial jurisdiction. In relation to disappearing from the name of the highest court of the state of sign, that this court operates exactly in Ukraine, to our opinion, is artificial reason for next reorganization of Supreme Court of Ukraine (farther – SCU). Actually to this day only SCU and Constitutional Court of Ukraine (farther – CCU) had an excellent degree of legal security, as their status was determined BasicLaw, reformers had the opportunity without the change of that no structural reforms of the judicial system of these courts touched them only will limit judicial plenary powers of SCU, as it was in 2010 Changes in Constitution of Ukraine created pre-conditions for the complete restart of supreme judicial body. About the danger of such step cautioned to judge CCU, when gave an estimation to constitutionality of corresponding bill. In particular, judge of CCU S. Shevchuk (Stanislav Volodumurovich) in the separate opinion for the ground of possible negative consequences of making alteration in Constitution in part of change of the name of Supreme Court pointed the conclusion of European Commission "For democracy through a right" (Venetian Commission) (d. 111) in relation to a return to the Supreme court of Hungary of its the historical name "Curia" by making alteration in Constitution of Hungary, that resulted in pre-schedule liberation of judges of this court. Venetian Commission marked that at the acceptance of new constitution its transitional positions must not be used as a method of stopping of plenary powers of persons select or appointed after before by an operating constitution. Judge S. Shevcuk (Stanislav Volodumurovich) expounded warning, that the change of the name "Supreme Court of Ukraine" on "Supreme Court" obviously will result in reorganization of this Court, but even such perspective reorganization not a prize can conduce the judges of SCU to liberation, but possible is only a competition on employment of additional positions in a new court [11]. As seen, the marked warning did not become groundless. Without regard to that the authors of Law in an explanatory message did not accent attention on intention to liquidate SCU, and only to "deprive text of Basic Law of consequences of mechanical adaptation of the name "Supreme Court of Ukrainian Council Socialistic Republic"" [12], however Law of Ukraine "On the judicial system and status of judges" is envisage exactly liquidation of ВСУ from the day of cut-in of Supreme Court (п. 7 At eventual and transi-

tional positions) [2]. A positive change is fixing in Basic Law of new order of formation, reorganization and liquidation of courts exactly by a law the project of that brings in Supreme Council of Ukraine President of Ukraine after consultations with Higher advice of justice (century of a 125 Constitution of Ukraine). Actually such approach answers Convention about the protection of human rights and fundamental freedoms and practice of the European court on human rights (farther – ECHR) in relation to its application, although some scientists and practices expound the certain warning and on this occasion. In particular, as judge SCU O. Prokopenko (OlexanderBorusovich) marks, «if to take into account practice of work of Supreme Council of Ukraine, politization of acceptance by its decisions, it will result in abuse during realization of corresponding plenary powers, and also to tightening of making decision about formation or liquidation of courts" [13, 107]. To our opinion, plenary powers to form and liquidate courts a country's leader also hardly it is possible to consider a sufficient guarantee levelling of risks of abuse of the plenary powers given to the political subjects in the marked question. Negative practice is certain already took place in 2008, when by President of Ukraine it was created Central and Left-bank circuit administrative courts of Kyiv. Consider that however a risk of abuse of right is higher, when made decision individually, but not collectively, that is why estimate the new going near this question as more rational. Besides it will assist the increase of legitimacy of court, as in its formation/of liquidation will participate a basic source of state power is people, though mediated – through select by its representatives – state deputies. But other risk sees languages other. Plenary powers in relation to formation/of liquidation of court will be passed to by President of Ukraine Supreme Council of Ukraine only after introduction of new administrative-territorial device of Ukraine in accordance with changes in Constitution of Ukraine in relation to decentralization of power, but not later, than on December, 31, 2017. But a department judicial is state power, courts – by public institutions, but that is why argued not enough is position of deposit of delivery of the marked function from President to the legislative body. It is possible to expound warning from attempt of President of Ukraine to save the influence on the process of forming of the new judicial system, and thus, construction really independent system of judicial government bodies again under threat of political influence and certain political interest. Does not eliminate this warning and maintenance after President of Ukraine (for a term of 2) of plenary powers in relation to translation of judge from one court to other. Taking into account, that by law of Ukraine "About the judicial system and status of judges" [2] these plenary powers will belong to Higher Council of justice, and by law of Ukraine "About the judicial system and status of judges" in a release in 2015 these plenary powers divided between President and Parliament. In particular, if change touched permanently selectedjudges, those, gave Parliament legitimacy of status of that, then a question about translation in the highest or other specialization court decided exactly Supreme Council

of Ukraine. In accordance with changes in Constitution in relation to a justice, President not only sorts out on itself plenary powers in relation to change of judges select Supreme Council of Ukraine but also during 2 years will carry out these constitutional plenary powers of Higher Council of justice. All of it again makes impression attempt of country's leader personally to control forming of the new system of the judicial system. Such situation, from one side, can be supported, if to weigh, that President of Ukraine bears the personal responsibility for a general public legal policy, including in part of material well-being in the state of right on a just court. In the conditions of political pluralism and state of political culture in the state, really, to realize the row of progressive reforms maybe exactly in the conditions of levers of independent control and personal responsibility. However, such idealistic variant is possible only on condition of complete exception illegal abuse of a right, including from the side of reformers. But during 2014–2016 we had the opportunity to look after a reverse situation exactly, when it was not assigned for justiceship of not a single person, that passed a competitive selection in accordance with procedure certain a law; plenty enough of judges got the largeness enough of judge reward, but shut out to realization of justice as a result of non-acceptance of corresponding act Supreme Council of Ukraine, or through not realization of procedure of bringing of oath before President of Ukraine. Thus, coefficient them useful effect on realization of justice equalled a zero, and the losses of the State budget of Ukraine, related to their maintenance, were large enough. As a result of it a right on access in the court of many persons was broken, in fact or in courts in general there were not judges with plenary powers to carry out a justice, or loading on judges was so large, that clever term of consideration of cases and operative renewal in rights violated from lens them reasons. And it all took place then, when a law was foreseen a mechanism liberations of judges, that does not answer held a position, in particular by a way about the conduct of primary qualifying evaluation statutory Ukraine "About providing of right on aobjective court". At such practice "On the judicial system and status of judges" it is expedient new Law of Ukraine to eliminate the similar risks of abuse of right in the future, but it does not contain such safety devices. In particular, a term during that President of Ukraine must give out a decree about assigning for justiceship in case of bringing of corresponding presentation by Higher Council of justice is eliminated in general; by an admitting moment to realization right judge as well as before certainly adjurationof oath and again in difficult enough, from the point of view of practical realization, ceremony – in presence President of Ukraine and without determination of term, during that it must take place. All of it not adds guarantees to independence to the department judicial and subjects that carry out it, but main are hopes on its efficiency. It follows positively to assess the new situations of Law in part of narrowing of immunity of judges to functional. A judge must bear the criminal or disciplinary responsibility for crimes (for example, receipt of illegal benefit) and disciplinary about mortars that mediated can influence

on legal position of judge at realization to them of justice. In relation to actions, unconnected with implementation judge functions, a judge will bear the legal responsibility in the general order. Undoubtedly, deserves in support and exception of political context at a decision-making in relation to the grant of consent to detention of judge or maintenance of its under a guard or arrest, as these plenary powers go across from Supreme Council of Ukraine in Higher Council of justice. On the whole supporting an attempt to create in the system of judicial government bodies a single coordinating centre from forming of financial, organizational and skilled policy of judicial department, consider that some plenary powers of Higher Council of justice had to limit. In particular, it touches a decision-making about liberation of judge. Taking into account, that legitimation of judges as transmitters of one of branches of state power it takes place people mediated – through directly select by its President of Ukraine, however people even mediated do not take participating in privation of legitimacy of judge - plenary powers to free judges are given to Higher Council of justice. Maybe, in this norm the mechanism of inhibitions and counterbalances is stopped up in cooperation of President of Ukraine and department judicial, but, consider that at such release Higher Council of justice gets surplus of plenary not powers that contain potencies well threat to judge independence. In addition, to the competence of Higher Council of justice both a disciplinary production in relation to all judges and decision-making is attributed about liberation of judge. Unfortunately, to the bill "About Higher Council of justice" yet not under it is prepared, we cannot estimate that is why, as far as during organization of work of this organ the remark of ECRP is taken into account, set forth to them in Decision from January, 9, 2013 on cases "Olexander Volkov against Ukraine" (d. 113) in relation to differentiation of functions of initiation of disciplinary production in relation to a judge, actually disciplinary production and decision-making about liberation of judge [14]. However, having regard to maintenance of constitutional norm in relation to the competence of Higher Council of justice, consider that it will be enough to provide the marked differentiation hard. Within the limits of release of Law, to our opinion, it would be expediently to fasten plenary powers from collection of information on the breach of discipline after the Higher qualifying commission of judges, trial of disciplinary cases on contention principles – in the Disciplinary court, and decision-making about liberation of judge on the basis of set by the marked court of fact of "commission of substantial breach of discipline, rough or systematic neglect by duties that are incompatible with status of judge" – Higher Council of justice.By the key questions of the new stage of judicial reform, that substantially distinguish it from previous, an attempt to unite a question reforms of the judicial system and contiguous institutes, that further justice, are offices of public prosecutor and advocacies became. In relation to the office of public prosecutor, then the question of determining its location in the system of division of power is actual from the moment of acceptance of Constitution of Ukraine 1996, in that

transformation of its functions was then stopped up yet, but the real step in this direction was not until now, however already passed quite a bit time and more forward measures had to be accepted in relation to status of office of public prosecutor. A legislator prepared necessary for thisstarting conditions, in particular, accepting the Criminal procedural code of Ukraine in 2012 and Law of Ukraine "About the office of public prosecutor" in 2014. It should be noted that the only model of status of office of public prosecutor does not exist in the world. Therefore the authors of Law had to be determined: whether it follows to save status of office of public prosecutor, that was until now, or transform it in an organ that will provide terms for realization of justice. We fully support disappearance of function of supervision on the stage of pre-trial investigation; its transformation in the function of judicial guidance is fully just, as it better represents the specific of role of public prosecutor on the stage of pre-trial investigation, than function of supervision. If to give the general estimation of strategic vision of transformation of the office of public prosecutor, stopped up in changes in Constitution of Ukraine, and then consider it positive. The input of constitutional changes will assist strengthening of contention principles of rule-making and arbitration function of court. But status of office of public prosecutor in the system of department judicial requires the greater guarantees of its independence, including political. Therefore, we cannot support maintenance of institute of mistrust of Ukraine Supreme Council to the General Prosecutor of Ukraine, as it destroysall conception of transformation of office of public prosecutor from a political institute in the institute of providing of justice. It is although necessary to admit, Parliament from times of acceptance of Constitution of Ukraine in 1996 not a single time by the right to expound a mistrust to the General Prosecutor did not avail, as well as there was not a single General Prosecutor of Ukraine, that would consist of position the complete term foreseen by Basic Law. Also we cannot support position in relation to privation of Office of Public Prosecutor of function of supervision after inhibition of law at implementation of court decisions in criminal cases. To our opinion, it is not logical, as a public prosecutor is on the stages of pre-trial and judicial criminal realization, but he is not on the stage of implementation of sentence. Clever explanation in Constitution of Ukraine we do not see such position of authors of changes, especially if to take into account that ECPR repeatedly paid attention to unity of three stages of realization – pretrial, judicial and implementation of court decision. Also we with carefulness behave to limitation of representative function of office of public prosecutor. Supporting on the whole the idea of setting to function of protection of rights and interests of man on to the advocacy, together with that have warning, or will not remain out of limits legal help, including state, habitants of district centres and villages. Capable advocacy to provide the proper quality of legal aid, in particular and free, on all territory of the state? Will not create limitation of representative function of office of public prosecutor of obstacle in availability of justice? Although on the

whole an idea, in relation to the monopoly of advocacy on the representative office of rights and interests of person in a court, will pawn on the Article 1312 Law, impresses enough, as proposes increase requirements to the professional protection of rights and interests of person, effective rule-making. But from the practical point of view causes a disturbance in part of availability of legal aid for all layers of population and on all territory. To the analysis of efficiency of activity of centres from the grant of secondary legal aid on all territory of Ukraine did not come true. In addition, there is a doubt at an appropriateness and efficiency of this norm for defence of interests of legal entities, and on occasion even is impossible from objective reasons. However, it should be noted that ideal legal norms do not exist. Although to the legal technique of constitutional norms and increase requirements belong, in fact when made alteration to the act of the greatest legal force, so to Constitution of Ukraine, every offer position, even separate word or comma, must be self-weighted and concerted with text of Basic Law, but however develop them, give to them life implementation laws. Have a hope, that new Law of Ukraine "On the judicial system and status of judges" will become foundation for a construction really independent, strong department judicial, able to provide the real right on a just court. The improvement of legal status of organs that further justice will strengthen the guarantees of legal defence in the state.

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Новий етап судової реформи: очікування та сподівання

2 червня 2016 р. парламент прийняв Закон про внесення змін до Конституції України щодо правосуддя, якими закладено оновлені конституційні засади судової влади та суміжних інститутів – прокуратури та адвокатури. На думку законодавця, конституційні зміни в частині правосуддя мають сприяти реалізації повномасштабної судової реформи та оновленню суддівського корпусу відповідно до суспільних очікувань і згідно з європейськими стандартами, відновленню довіри громадян до судової гілки влади, а також забезпеченню належного функціонування прокуратури та адвокатури. Разом з тим, певні положення нових конституційних норм містять неоднозначне сприйняття та потребують критичної оцінки щодо потенційного ризику зловживання правом при прийнятті наступних імплементаційних законів. Стаття присвячена саме критичному аналізу положень зазначених змін до Конституції України щодо правосуддя та висловлюються окремі пропозиції до змісту закону, який має імплементувати нові конституційні засади системи правосуддя.

Ключові слова: судова реформа, правосуддя, Конституція України, зміни щодо правосуддя, судова влада та суміжні інститути.