Reforms of the Judicial System in the Context of Fighting Corruption

The article reveals the essence, conditions of occurrence, modern features, effects and extent of corruption in the judicial system of Ukraine. The article covers actual problems of combating corruption in the courts considering the legislation, European experience and public opinion. We analyzed achievements in this area and prerequisites for the restoration of public confidence in the judiciary, ensuring the implementation of citizens' constitutional rights. We made suggestions for improvement of the judicial system of the state and for positive impact on the fight against corruption.

Keywords: corruption, corruption in the judiciary, judges, courts of general jurisdiction.

No matter how embarrassing it is, but we have to recognise that today, the corruption in Ukraine has acquired a systematic character today, manifesting itself and having taken roots in all state authorities and spheres of social life, and with its essence acquiring new forms and scopes.

The problems of introducing a judicial reform in Ukraine and fighting corruption continue remaining important and first-priority objectives, especially in
view of the European integration of our country and the harmonisation of its legal system with the standards of the European Union and the Council of Europe.

If earlier, these problems used to be seen as separate areas of reforms, then recently, they have become inextricably intertwined, in view of the fact that the problems of the judicial system are largely caused by a high level of corruption, which has finally resulted in a decrease in people’s confidence in courts and judicial authorities in general.

Therefore, it is necessary to conduct a research into the state of corruption in the judicial sphere and the causes that led to its emergence and expansion, whose results can be used to prepare respective measures aimed at implementing the anti-corruption policy, including in the process of law-making and preparation of required draft regulatory legal acts.

The issues related to fighting corruption are widely discussed and considered by many domestic scientists and scholars. Particularly, M.I. Melnyk states that broadly defined, fighting against corruption means any activities in the sphere of social management aimed at reducing possibilities of corrupting social relations, securing the rule of law, implementing other principles of law, facilitating the development of a democratic society and consolidating a rule-of-law state.

Narrowly defined, fighting against corruption means a system of measures of a political, legal, managerial, ideological, socio-psychological and other character aimed at reducing the scope of corruption, changing the character of corrupt practices, limiting the interconnection between corruption and social processes, increasing the risk for persons committing corrupt offenses, neutralising effects and eliminating factors of corruption, bringing persons that have committed corrupt offenses to legal responsibility, reinstating legal rights and interests of natural persons and legal entities, eliminating consequences of corrupt practices [1, p. 216].

The selection of the subject of this article is caused, first of all, by the topicality of today’s processes aimed at restoration of the society’s confidence in judicial authorities, which has gone down significantly during the recent years specifically because of their corrupt practices, which, in its turn, neutralises the right for access to
courts guaranteed by the Constitution of Ukraine. Courts, which must be model and reliable instruments in the fight against these practices, have conversely changed into one of the most corrupt institutions.

The powers of courts include examination of disputes, in which both natural persons and legal entities can act as parties, their rights and interests. In this connection, it is especially important that courts must observe laws, as a man’s future life may depend on this.

To measure the scope of corruption in Ukrainian courts, let us refer to respective results of researches conducted by domestic and international institutions.

The results of the Global Corruption Barometer research by the Transparency International and the Gallop International Association, which was conducted from the summer of 2012 until the winter of 2013 and covered over 114 thousand people in 107 countries, show that 68% of Ukrainians are ready to protest against corruption, with 36% of them ready to take part in street protests. 43% of those polled think that the level of corruption in Ukraine has grown for the recent two years, 74% are convinced that the state sector is corrupt and 80% called anti-corruption measures of the Ukrainian government inefficient. At the same time, Ukrainians think that the judicial sphere in most corrupt (66%), followed by the law-enforcement bodies (64%), the state service (56%), the health service (54%), the parliament (53%), the political parties (45%), the educational system (43%), the businesses (36%), the military sphere (28%), the mass media (22%), the religious institutions (21%), the public organisations (20%) [2].

The Report on the results of implementation of measures aimed at prevention of and fight against corruption in 2013 published by the Ministry of Justice of Ukraine [3] says that during 2013, the authorities took measures aimed at liquidation of corruption in the judicial branch of the power. Last year, prosecutors filed 17 accusations to courts against 15 judges, one head of a district court administration, one court secretary, and one deputy judge.

As of March 18, 2014, investigators of prosecution agencies carried out prejudicial inquiries in criminal proceedings against three judges and one deputy
judge, who were notified about their being suspected in committing criminal corrupt offences.

As a result of the measures aimed at fighting corruption in the judiciary, 47 offenses committed by judges were recorded, with 29 of them being receipts of illegal profits.

As part of the efforts to combat corruption in the judiciary, 47 prejudicial inquiries were initiated against judges and officials of judicial authorities based on materials collected by special subdivisions of the Security Service of Ukraine, including 17 inquiries under Article 368 of the Criminal Code of Ukraine.

According to the data of a corruption poll of businessmen conducted in 2013 by the American Chamber of Commerce in Ukraine, the respondents named courts (22%) and central executive authorities (21%) as most corruption-affected.

Examining the reasons that cause such a high level of corruption in courts, we can state the following main reasons: first, improper financial provision of courts, which would secure their independence and keep from any kind of temptation of financial beneficiation; second, impact on judges by certain politicians, representatives of authorities and businesses for the purpose of obtaining a desired result of case examination (in this case, a judge starts to feel somehow protected and confident in his/her impunity, combined with financial benefits); third, the absence of a unified mechanism for bringing a judge to responsibility, when owing to such “business” relations with certain influential persons and politicians, judges avoid responsibility; four, non-compliance with or unfair practical application of provisions of the current laws.

We should agree to the point of view of V.M. Soloviov, a domestic scientist [4, p. 126 – 129], who says that wide competences of judges to perform legal proceedings in all social legal relations provoke representatives of legislative and executive branches, as well as entrepreneurs to take illegal actions (pressure, bribes and other corrupt practices) towards them for the purpose of acquiring control over courts, judges and their use for mercenary purposes.
At the same time, with the judicial system being covered with corruption, corruptionists manage to avoid responsibility by bribing judges and committing other illegal actions.

Under the conditions of corruptness of servants of justice and law enforcement officials, the state is unable to secure implementation of the rule of law. Therefore, introduction of a judiciary reform is fully reasoned; its priorities should include formation of an efficient and independent system of courts and law enforcement agencies, which should become an integral part and is a mandatory condition for the fight against corruption in Ukraine.

The corruptness of the judicial system does not only jeopardise implementation of the rule of law in Ukraine, but also, in view of the scope of the corruptness, presents a threat to the country’s national security and, consequently, requires taking resolute and considered actions.

During the recent years, there have been certain reforms in this sphere, which included, among others, the adoption of respective legislative acts. However, the today’s conditions in this sphere, unfortunately, suggest that the earlier actions have fallen short of expectations and challenges of the society.

As is known, the Law of Ukraine “On the judiciary and the status of judges” [5] was adopted in 2010; the goal of the law was to provide for comprehensive improvement of the judicial system and justice in Ukraine to meet European standards.

The goal of this law was to harmonise the judicial system, the procedure for selection of judges and the mechanism of bringing them to responsibility with the European standards, to strengthen the guarantees of judges’ independence, as well as to optimise and simplify court proceedings.

At first sight, it is an important and landmark event and the result of many years of work. This law was assessed by European experts. The Opinion of the Venice Commission No. 588 dated October 18, 2010 [6] has positive assessments of the majority of the provisions of this law as corresponding to European standards, but
gave recommendations as to the further improvements of the system of justice, including its constitutional principles.

However, the practical application of this law indicated a number of problems, which, taken together, resulted to an increase in the level of corruption in the judiciary.

Recently, politician, public figures and activists actively started to raise the necessity of “lustration” of judges and to “clean the judicial power”.

In order to increase confidence in the judiciary, whose level had gone down considerably during the previous years, on April 8, 2014, the Verkhovna Rada (the Parliament) of Ukraine adopted the Law of Ukraine “On reinstatement of confidence in the judicial power in Ukraine” [7]. The ideas suggested in this law can be to some extent called revolutionary, as the law provides:

- carrying out a special inspection of judges from courts of general jurisdiction, for which the Interim Special Commission for Inspection of Judges of general Jurisdiction is established at the High Council of Justice, which, during six months after the moment it starts operation, will examine complaints against judges’ actions and, as a result, will file a respective proposal to the High Council of Justice that will take its disposition decision;

- dismissing all heads of courts and their alternates from their administrative positions in all courts of general jurisdiction (except for the Supreme Court of Ukraine) and electing new heads of courts and their alternates by judges’ meetings;

- terminating the powers of members of the High Council of Justice, except for those who are members of this body due to their titles, and the High Qualification Commission of Judges of Ukraine, and re-appointment of members of these bodies according to a renewed procedure.

At the same time, after the adoption of the above law, there were no fundamental changes or expected effects in the judiciary. During the XII Extraordinary Congress of Judges of Ukraine (June 19-20, 2014), where new members of the High Council of Justice and the High Qualification Commission of
Judges of Ukraine should have been elected, no resolution on these issues was adopted.

Besides, Kyiv District Administrative Court approved a resolution dated May 27, 2014, which recognised the operation of the head of the High Qualification Commission of Judges of Ukraine as illegal and obliged him to perform certain actions. In the declarative part of this resolution, the court presented its opinion that according to the provisions of the Law of Ukraine “On the judiciary and the status of judges”, the High Qualification Commission of Judges of Ukraine shall exercise its powers until the newly formed Commission started its operation [8].

Moreover, the constitutional submission of 76 people’s deputies of Ukraine on conformance to the Constitution of Ukraine (constitutional validity) of the Law of Ukraine “On reinstatement of confidence in the judicial power in Ukraine” [9] is pending examination by the Constitutional Court of Ukraine.

The legislative initiatives aimed at reinstatement of the mechanism, which was in force until 2010, of inspections and preparations of materials by the Committee for the Rule of Law and Justice for examination by the Verkhovna Rada (the Parliament) of Ukraine of issues related to termless election of judges cannot be recognised positive. It is direct negligence of the recommendations of the Venice Commission, which continually pointed out the necessity to eliminate the political impact of the Verkhovna Rada (the Parliament) on the process of election of judges, especially in view of the initiated European integration process [10].

The analysis of the current situation provides a possibility to determine the following major obstacles to the fight against corruption in court:

- absence of the unified understanding of the current problems in the judicial sphere which impede establishment of fair justice in the country and cause corruption in courts;

- absence of clear and well-coordinated steps towards further reforms in the judiciary and solving the current problems.
Recently, these problems have been actively used by certain political powers or politicians in election campaigns and political activities to gain public favour and raise their ratings. But these are all words, not deeds.

The priority of further reforms in the judiciary and fight against corruption was lately stated in the European Union Council Conclusions on Ukraine approved at the Foreign Affairs Council meeting on June 23, 2014 in Luxembourg [11]; Clause 5 of the Conclusions says that “The EU encourages the Ukrainian authorities to continue their reform efforts, including as regards constitutional and decentralisation reforms, the rights of persons belonging to national minorities, the reform of the judiciary, fight against corruption and improving the business climate. These efforts should be brought forward through an inclusive national dialogue. The Council welcomes the continued strong engagement of the Council of Europe and other international organisations in assisting the Ukrainian authorities to ensure that these reforms are in line with European standards”.

President of Ukraine Petro Poroshenko expressed his position on the reforms of the judiciary, too, when he spoke about the release of convicted V. Lozynskyi by a judge of Boryspil Municipal and District Court of Kyiv Region, by saying that “it is impossible to imagine a brighter negative example which would illustrate the critical condition of the judiciary. Lozynskyi is its speaking diagnosis”. At the same time, the President emphasised that “the reform of the judicial system is one of the today’s priorities” [12].

Such initiatives are currently actively advocated by the Ministry of Justice of Ukraine. For example, during the briefing held at the Cabinet of Ministers of Ukraine on July 2, 2014, Minister of Justice Pavlo Petrenko informed that the Cabinet of Ministers had approved ten top-priority anticorruption measures, such as formation of an efficient anticorruption policy, reforms of the judiciary and criminal justice bodies. In particular, Pavlo Petrenko said that “our top-priority is to adopt a restated version of the Law “On the judiciary and the status of judges” and the law on extraordinary attestation of judges. This process is artificially drawn out, because the system did not
agree to clean itself and the state bodies that has to conduct the attestation are not fully formed” [13].

At the same time, today’s Ukraine is faced with a great problem related to legal culture. The current law application practices suggest that even the newly adopted law, whose provisions have found a positive feedback of European experts as corresponding to European standards, eliminates all its positive features as a result of improper application and draw criticism. And again, it suggests that the problems should be solved by adopting another law.

In this view, we should agree to a statement of Stephanie Hubig, State Secretary of the German Federal Ministry of Justice and Consumer Protection, during the meeting at the Ministry of Justice of Ukraine on April 1, 2014, who said that the Ukrainian greatest problem is practical application of laws [14].

The results of the research conducted in this article make it possible to formulate the following implications:

1. First of all, the country should adopt a respective comprehensive state programme for fight against corruption in Ukraine, which should be based on a fundamental analysis of the causes of emergence of corruption and determine clear goals, objectives and measures aimed at fighting it.

Positive moves in this direction have already been launched. We mean the draft Law of Ukraine “On the principles of the state anticorruption policy in Ukraine (the Anticorruption Strategy) for 2014-2017” (Registration No. 4284a dated July 14, 2014), which the Government introduced to the Verkhovna Rada (the Parliament) of Ukraine; Section 5 of this draft law is especially dedicated to problems related to preventing corruption in the judiciary sphere [15].

For the purpose of reforming the judicial system in Ukraine and eliminating corruption risks in legal proceedings, the draft law suggests a number of legislative measures, such as adoption, in view of the conclusions of the European Commission for Democracy through Law (the Venice Commission), of amendments to the Constitution and laws of Ukraine aimed at reforming the judicial system and the status of judges on the basis of European standards directed at:
- reduction of the scope of judges’ immunity and granting of only functional immunity to judges (immunity from accusations for actions committed in the process of performance of their judicial functions);
- settlement of issues related to prevention and resolution of conflicts of interests in the operation of representatives of the judiciary;
- filing, disclosure and monitoring of reliability of the data from judges’ declarations of property, incomes, expenses and financial obligations;
- establishment, within the judicial system, of a separate body or vesting judges’ self-administration bodies (not associated with disciplinary functions) with consultative functions with regard to standards, conflicts of interests and declarations of property, incomes, expenses and financial obligations;
- arrangement of regular training for judges on issues related to standards for prevention of and fight against corruption, taking them into account in attestation of judges.

2. Before starting solving corruption problems in the judiciary, the country should carry out the so called “lustration” of judges, which should be considered, individual and comply with legal requirements. To initiate bringing judges to responsibility or dismissing them from their positions for formal reasons, only because they examined cases and adopted decisions during a certain period of time or for certain matters is an incorrect and unacceptable method, from the point of view of law. Currently, the laws contain clear grounds for bringing judges to disciplinary responsibility and dismissing them from their positions, name the authorities that must examine these issues and take respective decisions. Therefore, we should provide for an objective inspection of the respective facts and take a legal decision.

3. At the same time, the efficiency of the judicial reform in Ukraine depends, first of all, on the correct arrangement of objectives in view of their priorities and the observance of order in their implementation. For instance, if there is a problem in imperfection of respective provisions of the Constitution of Ukraine, which make it impossible to solve certain problems in the organisation of the system of justice in a manner different from what they stipulate, then any attempts to regulate these
problems “in a different way” by adopting laws, as experience shows, will be of no effect. And, which is most important, the process of reforming the judicial system should be as transparent as possible and provide for possibilities for the society to be actively involved in it. Such an approach will enable to carry out qualitative and efficient work, whose results will be approved by the society, whose major demands are accessibility of justice and fair judiciary.

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