

OSCE Human Dimension Implementation Meeting 2006

Judicial reform in Ukraine: on the way to a fair trial

Session 7. Access to Justice

Introducer:

Roman Romanov

International Renaissance Foundation

National Commission for the Strengthening Democracy and the Rule of Law

Dear Mr. Chairman,
Your Excellencies,
Dear participants,

In my short speech I will try to address main issues of this session taking the country I represent as a good and bad example at the same time.

Recently Parliamentary Assembly of the Council of Europe raised concern over structural problems in judiciary systems of several member states and Ukraine is on this black list. This concern came from non-sufficient implementation of judgments of the European Court of Human Rights. The most serious alarm from Strasbourg was Court's judgments on Sovtransavto Holding case (25/07/02). The Court found impermissible interference by the executive with the administration of justice.

Among the most clear systemic problems in administration of justice in Ukraine are named:

- Chronic non-enforcement of domestic judicial decisions delivered against the state and its entities;
- Violations of the requirement of legal certainty;
- Lack of effective investigation of ill-treatment in police custody cases.

Positive trends:

- 1) A new Law on the Enforcement of Judgments and the Application of the case-law of European Court of Human Rights entered into force on 3 March 2006. This law provides for a coordinated approach, under the supervision of the Government's Agent before the Court, to ensure the proper implementation of the Court's judgments.
- 2) The Unified State Register of Judgments is functioning in Ukraine from June, 2006. It was established by the Parliamentary adopted Act.
- 3) On 27 June 2006 President approved the National Action Plan to improve enforcement of judicial decisions.
- 4) President asked the national Commission on Strengthening Democracy and the Rule of Law to draft Concept paper for a comprehensive judicial reform in the country. The Concept was developed, successfully passed international expertise on the Venice Commission experts and then was approved by the President. The Ministry of Justice drafted law amendments in line of the Concept paper and the Parliament soon will start discussions over those proposals.

The Concept paper approved by the President says:

The process of establishment of an independent judiciary in Ukraine has been rather conflicting and inconsistent. Another problem was presented by the strictly conservative approaches to the reform process and a lack of clear understanding of what the judicial system should be like in a state governed by the rule of law. The Ukrainian criminal proceedings have not been reformed since Soviet times: the 1960 Criminal Procedure Code, even though somewhat amended, does not comply with the human rights protection requirements compatible with European standards. Commercial courts adjudicate commercial cases in accordance with long-outdated rules inconsistent with the modern tendencies of civil proceedings development. Although the Code of Administrative Justice has already been adopted, there is still no law on administrative procedures, which would define standards of person's relations with state authorities (state officials) and compliance with which would be subject to oversight by administrative courts.

The procedure for selection of judges is not transparent, thus creating favourable conditions for abuse. The law does not provide clearly for a system of defining remuneration for judges. The low material provision of judges makes this position unattractive for highly qualified lawyers. At the same time, the position of judge offers ample opportunities to receive certain benefits of doubtful lawfulness and, therefore, attracts those people, whose moral values are incompatible with the concept of unbiased justice.

Judges holding administrative positions perform administrative functions that are not typical for the position of judge. Presidents of courts distribute cases among judges, form panels of judges for hearing separate cases, influence the career promotion and social security of judges (leaves, bonus payments, etc.).

As a result of this, Ukrainian courts have not yet become an effective human rights protection institution. Public opinion about courts is extremely negative. There are very few people who believe in the fair Ukrainian judiciary. The judiciary of Ukraine is not seen by citizens as an independent one.

Not less critical the President about judiciary are judges. According to reports available in medias on the recent plenary meeting of the Supreme Court among other problems corruption was named as one of the most serious problem. So the new reform to be successful has to address not only external influence (pressure from executive) but also internal factors of the system (corruption, professional education etc.)

The following has been defined as the objective of the Concept and its respective tasks:

- To create a methodical basis for the development of the judiciary in Ukraine;
- To ensure accessible and fair trial, transparent functioning of courts, and the optimisation of the system of general jurisdiction courts;
- To strengthen guarantees of the independence of judges;
- To enhance the professional competence of judges;
- To raise the social status of judges;
- To significantly improve the working conditions of judges;
- To radically improve efficiency in the enforcement of judgments;

In order to ensure independence of judges the mechanisms that will prevent outside pressure on a judge need to be created.

In particular, presidents of courts should be stripped of their powers that enable them to interfere with the court proceedings. Self-government should be ensured first of all at the

level of an individual court. Gathering of judges of a respective court should address issues related to specialisation of judges as well as: approve the procedure for distribution of cases among judges; approve the procedure for creation of panels of judges and appointment of chairmen; approve the procedure for replacing absent judges; decide on issues related to social benefits for judges; coordinate vacation schedule of judges; distribute sanatorium and spa treatment vouchers etc. All of these items should be decided at local level.

Remuneration of judges, their insurance, pensions and lifelong maintenance, have to be commensurate with high role that judges play in a democratic society. The guaranteed high remuneration of judges and such system of its payment that prevent the executive from influencing judges through regulating the amount of their salaries should be envisaged in laws. All components of remuneration of judges have to be clearly defined and include: basic salary rate, period of service, qualification category, fringe benefits for special working conditions (for example, those for investigating judges or judges of administrative courts during the election process) and for taking an administrative position in the court. Rate of the judge's remuneration must depend primarily on his/her work experience, professionalism and much less – on the level of court within the judiciary system. Increase of remuneration of judges should be done simultaneously with elimination of benefits that are not related to the status of a judge and violate the principle of equality of all citizens. Positive image of the profession of a judge has to be based on a high salary and a special role of a judge in the society, not on the system of benefits and privileges.

A ***much more transparent*** procedure for selection of professional judges and their promotion should be introduced. Any official who is involved at different stages in the selection process must not influence the way from a nomination to the position of judge. Appointment to another office and election of a judge to another, in particular higher, position should be done on a ***competitive basis***. Information about available vacancies, time and place of competition should be made public.

A competition for a position of judge should include a mandatory examination of candidate's knowledge of the Constitution of Ukraine, the Convention for the Protection of Human Rights and Fundamental Freedoms case law of the European Court of Human Rights, court proceedings and main branches of substantive law of Ukraine. In order to provide for a unified approach to assessment of candidate's professional level the candidate has to take a ***qualifying examination*** administered by an ***examination commission*** created by the Higher Judicial Qualifications Commission.

The educational and methodological support of judicial system calls for development. The Ukrainian Academy of Judges therein should play the leading role. It should provide for generalisation of the judicial practice on the scientific level, constantly provide to the courts methodological support, provide for training of candidates for judges and regular training of judges, arrange scientific and practical educational seminars, conferences, etc., cooperate with relevant institutions of other countries in terms of the exchange of experience in the sphere of justice, organise internships.

Disciplinary powers must be taken away from the judicial qualifications commissions since judicial discipline is not connected to qualification. There should be created a permanent ***Judicial Disciplinary Commission*** with a majority of members appointed by the Congress of Judges of Ukraine from within retired judges, and the rest – by the Congress of Attorneys of Ukraine from within attorneys not practicing in courts. Every person concerned must have a right to appeal to disciplinary bodies to initiate disciplinary proceedings against a judge. The Judicial Disciplinary Commission, the Higher Council of Judges and their members have to secure timely response to information about judge's actions that have features of a

disciplinary offence and careful investigation without interfering with administration of justice.

Completion of the formation of the system of administrative courts led by the Higher Administrative Court of Ukraine should become the first-priority step in the development of administrative justice system.

The judicial system of Ukraine should not include such courts as military courts. Judges of military courts have a special status compared to other judges (they, in particular, do military service; have military ranks; receive additional payments for military ranks), which contradicts the principle of unity of the status of judges. All of these are inconsistent with requirements for independence and impartiality of judges and do not meet European standards as interpreted by the European Court of Human Rights.

The system of *pre-trial investigation* in criminal case required drastic reform. Taking into account that the prosecutor's office is authorised to oversee the pre-trial investigation and to support the state prosecution in the court, it is necessary to bring into compliance with the Constitution of Ukraine the provisions of the law on the powers of the *prosecutor's office* with regard to the pre-trial investigation function. The state investigation service, as a central executive body with relevant territorial departments at the local level, should be created on the basis of departments of the prosecutor's office, which carry out the pre-trial investigation function.

The prosecutor's office should not possess the powers of general oversight, since such powers are similar to those which are executed by the judiciary, i.e. they are quasi judicial. Moreover, it should be taken into account that control over the respect for laws in specific spheres is already carried out by relevant state bodies.

In order to take off the load from courts it is necessary to develop **alternative (extrajudicial) dispute resolution** mechanisms, and also create conditions to stimulate less expensive and less formal ways for settling disputes. *Mediation*, which is the activity of professional mediators who lead the parties in legal dispute to a compromise and settlement of the dispute by the parties themselves, requires scientific substantiation and practical implementation. Expansion of activities of *the arbitration courts* should take off some load from the courts of general jurisdiction. The public should be informed about advantages that these remedies have compared to the judicial mechanism of rights protection. Address to the court should be used as an exceptional means to resolve the legal dispute.

The Constitutional Court of Ukraine is a sole body of constitutional jurisdiction. Legislation should prevent such situations when capability of the Constitutional Court depends on one of the bodies empowered to participate in its formation. Law should also prescribe the constitutional proceedings.

I hope Ukrainian official representatives would be able to present you on the next HDIM successful implementation of the comprehensive judicial reform in the country, which is not just moving us towards the best European standards but first of all it is vital for the Ukrainian society.