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RECOMMENDATIONS OF THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW ON THE STATUS OF THE SUPREME COURT OF UKRAINE

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The European Commission for Democracy through Law has acquired extraordinary respect among countries all over the world. Ukraine, as a member of this body, extensively uses the help of this body. This commission repeatedly provided recommendations about judicial system of Ukraine, including of the status of the Supreme Court of Ukraine. This article is dedicated to the influence of the European Commission for Democracy through Law for the status of the Supreme Court of Ukraine. The changes, which were made in its status, and the changes, which are planned, are analyzed in this article.

Keywords: court system, the Supreme Court of Ukraine, the European Commission for Democracy through Law, recommendation, constitutional changes.

Formulation of the problem. For the time of its existence, the European Commission for Democracy through Law (hereinafter – the Commission) has acquired extraordinary importance and respect among countries all over the world. Despite the fact that according to its statute it is a consultative body, its recommendations shall be taken for immediate implementation. Ukraine, as a member of the Venice Commission, extensively uses the help of this body for the purpose of implementation of the principle of the rule of law in the legal acts. The help of its specialists is very necessary especially nowadays, when Ukraine is on the path of reforms. The experts of the Commission shall pay great attention not only to the laws but also to the draft laws provided by our state. Due to the fact that the reform also affected the judicial system, the European Commission for Democracy through Law received for consideration the Law of Ukraine “On the Judicial System and Status of Judges” dated 10.10.2007, the Law of Ukraine “On Cleaning the Power” dated 16.09.2014, the Law of Ukraine “On Ensuring the Right to a Fair Trial” dated 12.02.2015 in which the new edition of the Law of Ukraine “On Judicial System and Status of the Judges” was presented and others. One of the main points which were emphasized was the status of the Supreme Court of Ukraine. At certain periods of time the scope of its powers, unfortunately, depended on the relations with the executive authority (the example is unjustified reduction of the judges of the Supreme Court of Ukraine from 95 to 20 judges in 2010.). Therefore, the recommendations, made by the Venice Commission, often contained observations on the narrowing of the Supreme Court of Ukraine, especially after the adoption of the Law of Ukraine “On the Judicial System and Status of Judges” dated 07.07.2010.

As a result of the willingness of the highest-level leaders of our country to be equal with the European values, the legal status of the Supreme Court of Ukraine has been significantly changed today. In our opinion, it is the recommendations of the Venice Commission that played an important role in it.

Analysis of the recent research and publications. The problematic of importance of the Venice Commission for our country was studied by the

famous scientists lawyers: S.V. Kivalov, M.P. Orzih, Yu.E. Polyansky, Y.M. Romanyuk, T.O. Svyda, A.O. Slyadneva, M. Stavnychuk and others.

Selection of the unsolved aspects of the problem. The European Commission for Democracy through Law encourages the direction of reforming of the Ukrainian legislation, in particular about the status of the Supreme Court of Ukraine. A controversial question is about the need of existence of the high specialized courts. This issue will be discussed below.

The **purpose** of this Article is to study the impact of the recommendations of the European Commission for Democracy through Law on the determination of the status of the Supreme Court of Ukraine and analysis of changes that occurred with it.

Presentation of the fundamental material. The European Commission for Democracy through Law has existed since 1990. It consists of 60 member countries, one associate member (Belarus), five states with the status of an observer (Argentina, Canada, Japan, Uruguay and the Holy See) and three subjects with a special status (European Union, South Africa and Palestine National Administration). Each country provides its representatives with whom the commission is formed. They are independent experts that have become famous thanks to its experience in the development of democratic institutions or improvement of the law or policy in their country [1, art. 2]. The Commission of Ukraine consists of S.V. Kivalov and V.P. Pylypenko.

The Commission shall elect from among its members a Bureau, composed of the President, three Vice-Presidents and four other members. The term of office of the President, the Vice-Presidents and the other members of the Bureau shall be two years. The President, the Vice-Presidents and the members of the Bureau may be re-elected.

The President shall preside over the work of the Commission and shall represent it.

One of the Vice-Presidents shall replace the President whenever he or she is unable to take the Chair. The Commission shall meet in plenary session as a rule four times a year. Its Sub-Commissions may meet whenever necessary. The Commission shall establish its procedures and working methods in the Rules of Procedure and shall de-

cide on the publicity to give to its activities. The working languages of the Commission shall be English and French [1, art. 4].

The European Commission is an independent advisory body that cooperates with the Member-States of the Council of Europe as well as with interested States not included in the Council of Europe, as well as with the international organizations and bodies.

During its activity the Commission shall have the following objectives:

- study of the legal systems of the Member-States, especially for the purpose of their convergence;
- clarification of their legal culture;
- consideration of issues arising in the democratic institutions, and strengthening and development of these institutions.

During its work the Commission shall give priority to the following:

- constitutional, legislative and administrative principles and methods that improve efficiency and strengthen democratic institutions and the principle of the rule of law;
- civil rights and freedoms, especially those that concern the participation of citizens in the activities of these institutions;
- contribution of local and regional authorities to the democracy development [1, art. 1].

The Committee of Ministers, Parliamentary Assembly, Congress of Local and Regional Authorities of Europe, Secretary General as well as States, international organizations or entities taking part in the work of the Commission may appeal to the European Commission with a request to review the legislative acts. [2, p. 6]

As for the Supreme Court of Ukraine we should note that according to the current legislation this court is the highest judicial body in the system of the courts of general jurisdiction, which shall include the local courts, courts of appeal and high specialized courts. It is this court that shall provide unification of jurisprudence in accordance with the procedure provided for by the procedural laws.

The situation and status of the Supreme Court of Ukraine has changed several times. In 2010 the Law of Ukraine “On the Judicial System and Status of Judges” was adopted. On June 15, 2010 the Deputy Minister of Justice of Ukraine Y.D. Prytyka appealed to the Venice Commission with a request to provide an opinion on this draft law [3, p. 1]. On June 23, 2010 the Commission provided the Deputy Minister of Justice of Ukraine with the previous comments. The experts of the Commission marked positive features of this law, namely the implementation of the automated document management and distribution of cases; election of judges on probation for an indefinite period of time; transfer of state judicial administration under judicial control; elimination of military courts, which is a remnant of the former Soviet system [3, p. 128]. However, the negative aspects of the law were also marked and one of which was a significant narrowing of the Supreme Court of Ukraine. The experts of the Commission emphasized the fact that the Supreme Court of Ukraine has lost its jurisdiction in civil and criminal cases in favour of the High Specialized Court for Civil and Criminal Cases,

which supplemented the existing two high courts for considering economic and administrative cases. According to the experts’ opinion, this situation had to lead to multiple collisions of jurisdiction. This problem could be solved by creating a special court – the court of “collisions” or its role could be played by the Supreme Court of Ukraine. However, the provisions of the law given to the European experts for consideration did not provide for such powers of the Supreme Court of Ukraine. Another negative factor according to the experts’ opinion was providing the specialized courts with the right to provide consultations and explanations of a recommendatory nature to the courts of lower level on the issues of applying the law in solving the cases falling within their jurisdiction. Also according to the Law of 2010 the competence of the Supreme Court related only to the issues of substantive law. The experts of the Commission have noted that there is no need to deny the Supreme Court of Ukraine in respect of powers regarding the procedural law due to the fact that most of the issues of fair trial are associated with the procedural issues. Also the attention was drawn to the new procedure for filing cassation appeals which provided for filing a cassation appeal through a high specialized court. In this case, the Court of Cassation, which made a decision, that is challenged, had to decide the issues regarding adoption an appeal for consideration itself or refusal in acceptance. Only the appeals taken into consideration were sent for consideration to the Supreme Court of Ukraine. The European Commission for Democracy through Law recommended providing the Supreme Court of Ukraine with the right to solve the issues on the adoption of appeals or refusal to accept itself. The experts noted that the new procedure in practice shall make the high specialized courts at a higher level than the Supreme Court of Ukraine [3, p. 21-24, 29-32].

The list of the powers of the Supreme Court of Ukraine has remained unchanged for a long period of time, but the new wave has made some amendments. On 12.02.2015 the Law of Ukraine “On Ensuring the Right to a Fair Trial” was adopted, which amended the Code of Ukraine on Administrative Offences, Economic Procedural Code of Ukraine and others, but the main importance is a new version of the Law of Ukraine “On the Judicial System and Status of Judges”. On February 20, 2015 the Head of the Presidential Administration of Ukraine B.E. Lozhkiy appealed to the Commission with a request to provide an opinion on the latter [4, p. 1]. Analyzing the changes in the status of the Supreme Court of Ukraine, the first stage marked the provisions of Part 5 of Article 13 of the Law of Ukraine “On Judicial System and Status of Judges”, which stipulates that the conclusions regarding the application of the rights, set out in the resolutions of the Supreme Court of Ukraine, shall be taken into account by other courts of general jurisdiction in the application of such rules of the law. The court shall have the right to withdraw the legal position set out in the conclusions of the Supreme Court of Ukraine, providing the relevant reasons [5, art. 13]. According to the experts’ opinion, this seems a good solution in the system in which there is no doctrine of binding precedent, but tries to ensure a consis-

tent approach to the legal interpretation [4, p. 25]. The European experts say that a clear separation between procedural and substantive law in the matter of competence of the Supreme Court of Ukraine for reviewing decisions does not exist anymore. The attention is also drawn to the fact that according to Article 77 of the Law of Ukraine "On the Judicial System and Status of Judges", as set out in the new edition, the judge of the Constitutional Court of Ukraine retired may be elected as a judge of the Supreme Court of Ukraine without making interviews or study of the judicial dossier. This is contrary to the provisions of the amended Law, which indicate the introduction of competitive procedures for appointment of judges as the general rule [4, p. 29].

So as of today, after considering all comments, the powers of the Supreme Court of Ukraine shall include the following:

- 1) Administration of justice in accordance with the procedure established by the procedural law;
- 2) Analysis of the judicial statistics and summarizing court practices;
- 3) Providing opinions on draft legal acts relating to the judiciary system, the judiciary procedure, status of judges, enforcement of judgments and other issues related to the functioning of the judicial system of Ukraine;
- 4) Providing opinions about the presence or absence of features of state treason or other crime in actions in which the President of Ukraine is accused of; At the request of the Verkhovna Rada of Ukraine making a written appeal on the impossibility of the President of Ukraine to perform his powers for health reasons;
- 5) Appeal to the Constitutional Court of Ukraine on the constitutionality of laws and other regulations, as well as an official interpretation of the Constitution and laws of Ukraine;
- 6) Ensuring the equal use of the rules of law by courts of different specializations in accordance with the procedure and in the manner established by the procedural law;
- 7) Performing other powers established by law [5, art. 38]

Due to the fact that the Venice Commission has repeatedly stressed the need in amending the Constitution of Ukraine, indicating that this is the only way to bring all Ukrainian legislation to the European standards, on March 3, 2015 the President of Ukraine P. Poroshenko signed a Decree by which he approved the Regulation on the Constitutional Commission, which shall develop proposals for improving the Constitution of Ukraine and its changing for the purpose of meeting the current needs of the society. According to the aforementioned Decree the Commission shall perform the following tasks:

- 1) Generation of the practice of implementation of the rules of the Constitution of Ukraine and proposals for its improvements, taking into account the modern challenges and needs of the society;
- 2) Elaboration of the agreed proposals for making a constitutional reform in Ukraine;
- 3) Ensuring broad public and professional discussion of proposals for making a constitutional reform in Ukraine with the participation of the leading experts in the sphere of the constitutional

law and other spheres of law, in the sphere of the social and political sciences, public figures, representatives of public associations and international organizations;

4) Preparation of the draft law (draft laws) regarding amendments to the Constitution of Ukraine according to the results of a broad public and professional discussion;

5) Promoting the establishment of an effective mechanism of interaction of state bodies, civil society and international organizations on the preparation and implementation of the constitutional reform in Ukraine;

6) Ensuring public awareness of the work on the preparation of proposals for constitutional reform and its implementation [6, p. 3].

At the first meeting of the Constitutional Commission held on April 6, 2015 it was decided to establish three working groups, among which a separate group is working on the issues of justice, related legal institutions and law enforcement.

On July 21, 2015 the Chairman of the Verkhovna Rada of Ukraine, Chairman of the Constitutional Commission of Ukraine Volodymyr Groysman provided the Venice Commission with the draft amendments to the Constitution of Ukraine in terms of justice, proposed by the Working Group of the Constitutional Commission on the issues of justice and related legal institutions and invited it to prepare an opinion on these changes [7, p. 4]. On September 10, 2015 V. Groysman appealed to the Commission with a request to provide an opinion on the worked-out version of the draft law, for which an opinion was provided in October [8, p. 2]. According to the proposed changes the legal status shall be defined as follows: the Supreme Court of Ukraine is the highest court in the judicial system of Ukraine [7, p. 19], but nevertheless the system of the specialized courts with their respective supreme courts shall be kept. Although the European Commission for Democracy through Law repeatedly stressed the need to unify the system of courts of general jurisdiction and transformation of high specialized courts in units of the Supreme Court of Ukraine (as an exception, it selects only the Supreme Administrative Court of Ukraine), it shall take such a decision of the Ukrainian authority [8, p. 11].

In our opinion, the fears of the European Commission about collisions in solving cases or conflicts between courts which may appear as a result of the presence of specialized courts are premature. As examples of the successful functioning of specialized courts we can note France and the Federal Republic of Germany. There are commercial tribunals, Councils of Pryudomiv, tribunals on social insurance, and parity tribunals for land lease and tribunals for maritime trade in France. In the Federal Republic of Germany – courts for labour cases, administrative courts, courts for social affairs and the courts for financial issues. Consequently, we consider that remaining in Ukraine specialized courts is a good solution which has historical grounds [9, p. 10-11, 124-125].

The experts of the Commission say that the proposed changes shall be generally positive and shall deserve support. Their adoption shall be an important step towards the creation of a truly in-

dependent judiciary system in Ukraine. The Venice Commission shall approve and shall be ready to provide further assistance to the Ukrainian authorities, if the latter appeals with the relevant request [7, p. 55, 57]

Conclusions and research prospects. Using the help of the experts the European Commission for Democracy through Law shall be an additional mechanism to ensure democracy and the rule of law in our country. The process of preparing the conclusions by the experts of the Commission shall be diligent and coordinated work, so their conclusions shall be viable, reasoned and recommended for implementation. In our opinion, taking the com-

ments of the Commission and elimination of errors made before in the preparation of the draft laws shall be an essential part of the legislative process.

For the long years of existence of the Supreme Court of Ukraine it is today when its status corresponds to the legally enshrined status of a “supreme court”. We believe that the comments of the European Commission for Democracy through Law had a positive effect on the position of the Supreme Court of Ukraine in the judicial system of Ukraine. We hope that in the future there will be further changes in its work taking into account the opinion of experts of the European Commission for Democracy through Law.

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РЕКОМЕНДАЦІЇ ЄВРОПЕЙСЬКОЇ КОМІСІЇ ЗА ДЕМОКРАТІЮ ЧЕРЕЗ ПРАВО ЩОДО СТАТУСУ ВЕРХОВНОГО СУДУ УКРАЇНИ

Анотація

Європейська комісія за демократію через право за час свого існування набула надзвичайної поваги серед держав світу. Україна широко використовує допомогу цього органу. Комісія неодноразово висловлювала рекомендації щодо судової системи України, у тому числі статусу Верховного Суду України. Ця стаття присвячена впливу рекомендацій Європейської комісії за демократію через право на статус Верховного Суду України. Аналізуються зміни, які вже в ньому відбулися та реалізація яких ще планується.

Ключові слова: судова система, Верховний Суд України, Європейська комісія за демократію через право, рекомендація, конституційні зміни.

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РЕКОМЕНДАЦИИ ЕВРОПЕЙСКОЙ КОМИССИИ ЗА ДЕМОКРАТИЮ ЧЕРЕЗ ПРАВО О СТАТУСЕ ВЕРХОВНОГО СУДА УКРАИНЫ

Аннотация

Европейская комиссия за демократию через право за время своего существования приобрела значительное уважение среди государств мира. Украина широко использует помощь этого органа. Комиссия неоднократно предоставляла рекомендации по судебной системе Украины, в том числе о статусе Верховного Суда Украины. Эта статья посвящена влиянию рекомендаций Европейской комиссии за демократию через право на статус Верховного Суда Украины. Анализируются изменения, которые в нём уже произошли и реализация которых ещё планируется.

Ключевые слова: судебная система, Верховный Суд Украины, Европейская комиссия за демократию через право, рекомендация, конституционные изменения.

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THE INFORMATION FUNCTION OF THE MODERN STATE

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The article focuses on the further study of theoretical and legal foundations of the information function essence and determination of its place and importance in the modern state functions system in the context of globalization and informatization of society. The author researches the phenomenon of the modern state in connection with certain state-legal changes in the world and provides a definition of the "modern state". Some innovations in information relationships are offered in the article such as "e-government".

Keywords: globalization, informatization, functions of the modern state, the information function, the modern state, e-government, access to public information.

Formulation of the problem. The main feature of a modern society is the growing role of information, informational relations and informational space, which is an essential part of all internal and external processes in public life, thus their regulation is one of the priorities of a state.

At different stages of historical development of a state major trends and types of public activities arise according to social needs that arise and are formed as the tasks of a state. These major trends and types of public activities are traditionally called functions of a state.

It is generally accepted that the modern state functions are the most general and stable directions of its activities aimed at solving key social problems. Such directions are determined by domestic and international legal order and are legitimated by society [6, p. 321].

Recently, the nation-state is increasingly engaged in global issues such as informational, environmental, cultural et al. These processes determine the rise of new functions. The impact of globalization is so significant that we can see the formation of a new reality, marked as "modern state" and a new understanding of its effective functioning. The image of the modern state is often replacing the image of a nation-state with its outdated features and functions [7, p. 6]. Therefore, first of all we have to determine what the modern state is and what its main features are, and only

then we can describe the main areas of its activities using the example of information function.

Globalization greatly enhances the role of information in society, causing many active discussions among scientists in different fields of knowledge. The speed of its spread, the lack of any real mechanisms of its spread and cross-border nature of its communications updates the information function of state, which has become the subject of research recently. This is due to the fact that the Soviet theory of state and law considered information activities of the state as a political and legal framework of existing ideology [13, p. 66]. A push to the research of information function was democratic transformation in the late 80s – early 90s of the twentieth century and the proclamation of the principle of transparency. However, the attention of scientists and legislators focused mainly on issues of the freedom of speech, the right to freedom of expression and belief, freedom of media [3, p. 22].

Analysis of recent researches and publications. At the present stage of the theory of functions study, which is a critical reconsideration of many previously developed general theoretical aspects of this category, there is still no common approach for their understanding. Among the recent studies are noteworthy developments of domestic and foreign scientists as Yu. M. Oborotov, E. A. Dzhurayeva, P. Klymentyev, O. M. Loschyhin,