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Constitutional reform: challenges and reality

Bar monopoly: opportunity for Ukraine?

The amended Law of Ukraine «On the Judiciary and the Status of Judges», adopted in 2016 brought the novelty of bar monopoly into the Ukrainian legal discourse. Article 10 of the abovementioned law envisages that "everybody has the right to the professional legal assistance...the bar shall operate to provide professional legal assistance".

The bar monopoly is well-known in the world; however, it remains a terra incognita for the Ukrainian law. In the Anglo-Saxon law countries, in particularly in the USA, the matter of general legal monopoly rather than bar monopoly, or, specifically, the monopoly of the legal profession is still disputable.

Pierre Bourdieu in his works provides a brief explanation of the legal monopoly origins. In the scientist's opinion, the legal monopoly is lawyers' socially recognized ability to interpret legal texts, which enshrine the legitimate, or rightful, perception of the world. The competition for monopoly to access legal resources helps justify the social distance between the laymen and the professional lawyers, widening the gap between law-based verdicts and untutored intuitive perception of justice.

Notably, the so-called monopoly was caused by high costs of legal education and other license requirements, which create access barriers to the lawyers' profession. Not only these barriers restrict access to profession, but also provide a reason for lawyers to assert that their mental and technical competences are above those of the legal services providers who are non-lawyer.

The common law countries were the first to adopt the laws which monopolized their jurisprudence system, reserving it for professionals; however, this monopoly has extended so much that it is now "besieged".

The main problem with a bar monopoly, according to American lawyers, is not only that lawyers enjoy an "unfair" privilege to provide legal services. A more fundamental problem is rooted therein: clients with low-income are unable to obtain free legal services, as only those recognized to be destitute may be eligible for free legal aid. Meanwhile, the privileged status of lawyers is waning and the laws prohibiting law practise by non-professionals are already being changed, thus allowing them to provide legal services in some of the cases. These cases include both legal services provided in courts and those outside of court proceedings. It is surprising however, that these discussions have been ongoing within academia for a couple of decades already.

The provision of the new Law of Ukraine "On the Judiciary and the Status of Judges" says that lawyers not licensed for law practise, but with higher legal education, specifically defence lawyers (advocates) have the right and privilege to provide legal services in court proceedings. This legal provision brings the

questions about the future of the institute of representation itself and the subjects of third party rights protection. Therefore, such institutions, as well as other subjects of legal assistance, remain "legitimate" on the pre-trial stage of the process.

However, is this legal novelty feasible? Undoubtedly a qualified lawyer is more likely to ensure a favourable outcome of legal proceedings for their client than a representative without lawyer's background. Results of studies in the United Kingdom and the USA confirm this: for instance, 21 per cent among the refugees who hired a lawyer had their cases resolved in their favour, while only 1 per cent of people with similar claims, who did not use lawyers' services had their claims positively satisfied.

Is this legal novelty democratic? As for the national legal practice, this concept, on the one hand, ensures the protection of citizen's rights in the court by a specialised person, while, on the other hand, there is a number of grounds entitling a person to receive such services for free, one of which is an average monthly income below the poverty line.

Professor Lesley Levin from Connecticut University argues that currently it is impossible to prove that representatives and lawyers (working in the same area) are efficient to the same extent, as well as it is impossible to prove the contrary. However, Prof Levin is convinced that the practice of licensing representatives without legal education in different court cases is a necessary condition to facilitate access to justice for many citizens. The Washington Supreme Court made a first step to dismantle the legal monopoly, authorizing limited licensed legal technicians to provide legal advisory services in the family law cases.

Thus, the institute of paralegals is developing in the USA. However, they will not be authorized to represent the rights of their clients in courts, while paralegals in Ontario are authorized to do so and can represent a person in minor civil cases and traffic rules offense cases.

The bar monopoly is a characteristic feature in a rule of law country, because it enshrines people's right to the professional legal assistance. However, establishing the criteria to restrict the bar monopoly is another necessary element for the rule of law to exist. The legislators should consider the complexity of court case while defining the bar monopoly limits. The Anglo-Saxon law countries experience proves that such novelties could also be applicable in Ukraine in the future, and paralegals could represent citizens' interests it in the procedurally uncomplicated cases related to family or administrative law area. In most of the cases this also envisages engaging non-advocate lawyers in implementation of the universal right to fair trial.

List of sources:

1. The Law of Ukraine «On the Judiciary and the Status of Judges» // Bulletin of the Verkhovna Rada of Ukraine, 02.06.2016, No. 1402-VIII.

2. The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law. — Translated form French into Russian: I.O. Kyrchyk. — The Social Sphere: fields and practices. Collection of articles. — М., 2005. // Access mode: http://gtmarket.ru/laboratory/expertize/3040 , (updated 29.12.2016)

3. Deborah Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 STAN. L. REV. 1, 4 n.7 (1981).

4. Leslie C. Levin, The Monopoly Myth and Other Tales About the Superiority of Lawyers, 82 Fordham L. Rev. 2611 (2014). Access mode: http://ir.lawnet.fordham.edu/flr/vol82/iss6/3. (updated on 28.12.2016)

5. Wash. Admission to Practicer. 28(F), -- Access mode: http://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&groupName=ga&setName=apr&pdf=1 (updated: 28.12.2016)

6. Felinda Mottino, Vera Inst. Of Justice, Moving Forward: The Role of Legal Counsel in New York City Immigration Courts, 40 (2000), -- Access mode: http://www.vera.org/sites/default/files/resources/downloads/353.409747_MF.pdf#page=41&zoom=auto,0,73 (updated: 28.12.2016)

7. The Law of Ukraine «On the Legal Aid» // Bulletin of the Verkhovna Rada of Ukraine dated 02.06.2011 № 3460-VI.

8. The Law of Ukraine «On the Bar and the Practice of Law» // Bulletin of the Verkhovna Rada of Ukraine dated 05.07.2012 № 5076-VI.

9. Paralegal Frequently Asked Questions, L. SOC'Y UPPER CAN., -- Access mode: http://lsuc.on.ca/licensingprocessparalegal.aspx?id=2147491230 (updated 28.12.2016).