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SOME PROBLEMS RELATED TO THE IMPLEMENTATION BY A JUDGE ANOTHER COMMERCIAL ACTIVITY

Some problems related to the implementation by a judge another commercial activity

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Despite the fact that the duty of administration of justice is a main task of a judge and is of priority in its activity, it is argued that the activities of a judge (execution of its duties) is not in direct relation to its physical location in the courthouse during the whole working day. It is noted that the legislator de facto recognized the right of a judge to carry out teaching activities during working hours. In the article the limits of application the Labor Code of the Russian Federation to the creative activity of judges are analyzed.

Keywords: professional activity of a judge, administrative and legal status of a judge, creative activity of judges, scientific and teaching activity of a judge.

Legal regulation of activities allowed for judges should be considered on the basis of a number of key constitutional provisions. There is a guarantee of the unity of economic space, free movement of goods, services and financial resources, support for competition and freedom of economic activity in the Russian Federation (part 1 of article 8 of the Constitution of the Russian Federation). This constitutional

and legal norm is ensured by the fact that everyone has the right to freely use their abilities and property for entrepreneurial and not prohibited by law economic activities (part 1 of article 34 of the Constitution of the Russian Federation). Meanwhile, for significant purposes of Constitution part 3 of article 55 of the Russian Federation Constitution provides for a federal law limiting the rights and freedoms of man and citizen, including the limitations of the implementation of socio-economic rights of judges.

Constitutional right to freely dispose of their abilities to work, and to choose kind of activity and profession does not preclude the legal enshrining of certain requirements for persons involved in the activity of the bodies of state power and local self-government, including judiciary.

A citizen of the Russian Federation, who wished to exercise the above constitutional right, voluntarily accepts the terms, limitations and advantages, which are bound to the acquired public legal status, and performs appropriate requirements under the statutory procedure. This implies that the prohibitions and limitations arising from the specific status of a person cannot be considered as an unlawful restriction of its constitutional rights. This legal position has been repeatedly expressed by the Constitutional Court of the Russian Federation in its decisions [1].

The limits of the constitutional and legal restrictions applied to judges are enshrined in the Law of the Russian Federation No. 3132-1 from 26.06.1992 "On the Status of Judges in the Russian Federation", which contains fourteen prohibitions, directly or indirectly related to the realization of the rights of judges. However, according to the forms of conduct requirements, five of fourteen prohibitions are optional, i.e., "allowing, under certain conditions to retreat from the main variant of conduct, choosing a secondary (backup) one" [8, 203].

According to one of these norms (paragraph 5 of part 3 of article 3), a judge should not be engaged in other commercial activities, except for teaching, scientific research and creative activity, engagement in which should not interfere with the duties of a judge and cannot be a valid reason for absence at a court proceeding if consent of the chairman of the court is not given.

During making a disclosure on the content of a publication topic, it is necessary to elaborate on the legal analysis of the above limitation. According to part 1 of article 44 of the Constitution of the Russian Federation judges are endowed with the freedom of literary, artistic, scientific, technical and other types of creative activity, and teaching, which is consistent with paragraph 3 of article 15 of the International Covenant on Economic, Social and Cultural Rights (New York, December 16, 1966), however, their implementation in this case is characterized by specific

features related to the administration of justice. They lie in the fact that the right to receive a property benefit in carrying out these freedoms is specifically enshrined in the RF Law “On the Status of Judges in the Russian Federation”.

Opportunity for a judge to exercise scientific, teaching, lecturing and other creative activities is allowed in the Code of Judicial Ethics [9], in article 10 of which is said that a judge shall be given the right without prejudice to the interests of justice to combine main activity with the scientific, teaching, lecturing and other creative activities, including of paid (compensatory) nature. This activity is regulated by the Code regardless of its compensatory nature (payment or getting other benefits of the material or other nature), and is considered as such upon existence. The condition for its implementation should not be at the expense of the interests of justice.

Particular attention should be paid to the fact that the provision to judges the right of teaching allows to attract to educational institutions the best trained lawyers in the field of application different types of law, well versed of the judicial system, its tasks and problems, which, in turn, can significantly improve quality of students learning, have a positive impact on subsequent work of graduates with the speciality, including in the judicial system of Russia.

In this regard deserves every support the position of the leadership of the Russian Academy of Justice, which pays great attention to the formation of the higher-education teaching personnel of the Academy: the academic process is carried out by qualified teachers (including 163 doctors of sciences, 729 candidates of sciences, 107 professors and 291 associate professors), acting judges of the Supreme Court, the Supreme Arbitration Court, the Constitutional Court, the Moscow City and the Moscow regional courts and retired judges [2]. In the Institute of State and Law of Russian Academy of Sciences of 67 part-time teachers, 10 are judges [3]. The combination in teaching the knowledge and experience of scientists and practitioners provides a higher level of education, a better compliance with objectives of vocational and special education. Moreover, scientific and teaching activity of a judge has a positive effect on the growth of the professional level of the judge, as it requires him to improve his qualification during the receipt of compulsory state education programs and his self-education for conducting high-quality scientific and teaching activity.

Positive value of teaching activity of judges is confirmed by foreign experience. In particular, the German model of lawyers training is characterized by a strong orientation towards practice. This is expressed, among other circumstances, in a high degree of participation of courts in the practical training of lawyers, and

detailed legal regulation of the organization of practice for future professionals at the federal and territorial levels. Legislation on the judicial system of West Germany serves as the state educational standard of higher legal education. Federal legislation obliges courts to participate in the practical training of lawyers [3]. Moreover, the Law on Administrative Courts of West Germany provides for the appointment of a judge under the instruction, which must be both a judge of an administrative court and lecturer in law in any higher education institution [5].

Special consideration must be given to the issue about the features of exercising teaching activity by a judge. Moreover, we note that, according to paragraph 4 of part 3 of article 3 of the RF Law "On the Status of Judges in the Russian Federation", the judges are forbidden to be engaged in business in person or by proxies, including being involved in the management of a business entity, regardless of its organizational-legal form. In accordance with paragraph 1 of article 2 of the Civil Code of the Russian Federation under the entrepreneurship is understood an independent activity, performed at one's own risk, aimed at systematically deriving a profit from the use of the property, the sale of commodities, the performance of work or the rendering of services by the persons, registered in this capacity in conformity with the law-established procedure. From this definition it is clear that not all activities aimed at generating income are entrepreneurial ones, but only those that are designed to systematic making of profit. In other words, a single getting of profit by a judge (regardless of its size) does not fall under the signs of the definition. Activities of judges leading to obtaining any kind of casual revenue bearing unsystematic nature do not refer to entrepreneurial activities [4].

The concept of teaching activity in the current legislation is not disclosed. However, comparing the norms of the Law of the Russian Federation No. 3266-1 from July 10, 1992 "On education" with the RF Law "On the Status of Judges in the Russian Federation", you can define it as the employment of judges associated with their participation in the teaching of educational programs in state, municipal and private educational institutions of all kinds.

The analysis of the norms of the Russian Federation Law "On Education" shows that educational activity can be performed both individually and through the conclusion of an employment contract for filling the position of academic teacher in an educational institution. Meanwhile, realization by judges of the constitutional freedom to engage in pedagogical activity is carried out with certain peculiarities. Thus, in accordance with article 48 of the Law "On Education" individual educational activity is considered as entrepreneurial one and is subject to state registration. In turn, in accordance with paragraph 4 part 3 of article 3 of the RF Law "On

the Status of Judges in the Russian Federation” a judge’s entrepreneurial activity is forbidden. Consequently, a judge does not have the right to be engaged in individual teaching activities.

Thus, the right to engage in paid teaching activity a judge may realize only in the form of cooperation with educational institutions. At this, he is not obliged to verify the existence of a registration certificate, license, and accreditation. An educational institution is responsible for the conduct of illegal (unallowed) activity.

Among the features of performing a judge’s teaching activity should be also noted the time of the activity. Judge is accepted for teaching job at the position of Professor, Associate professor, Senior lecturer, Part-time teacher. Teaching activity is also possible on other terms of employment and payment, outside of second job: in the case of exercising pedagogical work on an hourly basis to a maximum of 300 hours per year; performing by judges the management of graduates and doctoral students, as well as management of a department, management of a faculty of an educational institution with additional payment under the agreement between a judge and an employer (in this case, by analogy, the Decree of the RF Ministry of Labor No. 41 from June 30, 2003 “On the Peculiarities of the Part-time Job of Teaching, Medical, Pharmaceutical Workers and Cultural Workers” is applied).

Under the general rule secondary job is done in spare time (article 282 of the Labor Code of the RF). However, this normative provision shall not be applied to judges on the following grounds.

First, spare time for judges is considered the time after 6 p.m. As a rule, educational institutions do not work at this time. Therefore, the application of this general rule actually would mean recognition of the provisions of the Federal Law “On the Status of Judges in the Russian Federation” and the Code of Judicial Ethics on the right of judges to exercise teaching activity “dead” norms. Moreover, the implementation of teaching activity after the main working hours would actually mean depriving judges the right to rest, which would certainly has a negative impact on the quality of administration of justice.

Second, according to article 252 of the Labor Code of the Russian Federation all the peculiarities of legal regulation of labor of certain categories of workers, caused by a variety of reasons, are stipulated by labor legislation and other normative legal acts containing the norms of labor law, collective treaties, agreements, local normative acts (according to article 251 of the Labor Code of the Russian Federation peculiarities of labor regulation are establishment legal norms partially restricting the use of general rules on the same issues or providing additional rules for certain categories of employees). One of such normative acts is the RF Law “On

Some problems related to the implementation by a judge another commercial activity

the Status of Judges in the Russian Federation”, article 22 of which states that the legislation of the Russian Federation on labor applies to judges in part that is not regulated by the current Law. This Law regulates matters relating to the teaching activity of judges, allowing this activity in article 3. At this, the Law establishes two conditions for exercising by judges teaching, research and another creative activity: a) it should not interfere with the duties of a judge and cannot be a valid reason for absence at court proceedings, if has not been given a consent of the chairman of the appropriate court (for justice of peace – chairman of the appropriate district court, for court chairmen – the presidiums of the relevant courts, and in the absence of such presidiums – the presidiums of higher courts); b) this activity cannot be financed entirely by foreign states, international and foreign organizations, foreign citizens and stateless persons, unless otherwise is provided for by the legislation of the Russian Federation, international treaties of the Russian Federation or the agreements on a reciprocal basis of the Constitutional Court of the RF, the Supreme Court of the RF, the Supreme Arbitration Court of the RF, the constitutional (statutory) courts of the Russian Federation’s subject with the appropriate courts of foreign states, international and foreign organizations. It should be noted that, under paragraph 14 of explanations and recommendations of the Higher Judges’ Qualifications Board of the RF from March 17-21, 2003, there are no restrictions on the status of educational institution, in which a judge has the right to teach, in the legislation [10].

The first condition is more definitely set forth in the Code of Judicial Ethics: scientific, teaching, lecturing, and other creative activities should be conducted by a judge *not to the detriment of the interests of justice* (article 10). There is no contradiction, because in accordance with article 2 of the Code of Judicial Ethics exercising duties of the administration of justice is the main objective of a judge and a priority in its activities. Thus, “the duties of a judge” lie in the administration of justice, by which, in turn, is recognized the implemented by court law-enforcement activity on consideration and settlement civil, criminal and other cases. Consequently, infliction of harm to the interests of justice should be evaluated only in terms of performance of judicial duties on administration of justice, and more precisely, the quality of this work. In the literature, quite rightly emphasizes that the lack of reversed judgment, breach of the time terms of cases consideration, complaints from citizens and other entities – are the main indicators of quality of judicial work [7]. This quality of work of a judge, if he is engaged in teaching, research and other creative activities, indicates the possibility of its carrying out in the future.

The foregoing leads to the conclusion that the activities of a judge (execution of its duties) are not in direct relation to its physical location in the courthouse

during the working day – from 9 a.m. to 6 p.m. The condition of exercising part-time teaching (in their spare time), established by the Labor Code, does not apply on the judges, since the issue was settled by a special law that establishes a full list of conditions for exercising teaching activity by a judge.

And, last. All doubts will disappear completely when close examination of the second part of the first condition for exercising teaching activity by a judge: it is “cannot be a valid reason for absence at court proceedings, if has not been given a consent of the chairman of the appropriate court...”. Hence, teaching activity of a judge *may be a valid reason* for the absence at court proceedings, if has been given a consent by the chairman of an appropriate court! Since the hearings take place during working hours, the legislator had in fact acknowledged the right of judges to carry out teaching activity during working hours.

Thus, if a judge efficiently performs its duties, it can carry out teaching, scientific and other creative activities during the major working hours.

It should also address the issue of the number of study load judge and part-time work opportunities in several schools.

Due attention should be given to the issue of the amount of academic load and opportunity of part-time work in several educational institutions.

In accordance with part 2 article 282 of the Labor Code of the Russian Federation labor contract about off-hour work may be concluded with unlimited number of employers. In this case, any permission (consent), including one from the employer at the main place of work, is not required. As for the volume of academic load, then, under a general rule, for part time work it is limited to 0.5 rate. The application of this rule leads to a paradoxical situation: a judge can perform academic load in three educational institutions in amount of 0.5 rate in each (total 1.5 rate), but cannot work in one educational institution at one rate.

In our opinion, previously formulated thesis is fully applicable and to the described occasion. RF Law “On the Status of Judges in the Russian Federation” does not limit teaching work of judges in respect of academic load or the number of educational institutions in which they can work part-time. More precisely, such a limitation exists – teaching should not impede the fulfillment of duties to the administration of justice. Judge has the right to perform such a volume of academic load in one or more educational institutions that would not affect the quality of the administration of justice. Norms of labor legislation that limit the amount of academic load, which is exercised at part time jobs, do not apply to judges, since in this case there are relevant provisions of the Law of the Russian Federation “On the Status of Judges in the Russian Federation” (article 22).

The concept of scientific activity is contained in article 2 of the Federal Law of the RF No. 127-FL from August 23, 1996 "On Science and State Scientific-Technical Policy", by which scientific (research) activity is an activity aimed at obtaining and application of new knowledge. Scientist (researcher) is a citizen who has the necessary qualifications and professionally involved in the scientific and (or) scientific-technical activity. However, on the base of part 1 of article 44 of the Constitution of the Russian Federation, which provides for freedom of scientific creativity, we must assume that there is no need for obtaining and confirming the official status of a researcher for implementing scientific activity in any form. The legal framework for the assessment skills of scientists and specialists of scientific organizations, and the evaluation criteria are determined in the manner prescribed by the Government of the RF, and are ensured by the state system of certification.

Among Judges of the Russian Federation works sufficient number of persons with academic degrees and academic titles, and it should be assessed as positive phenomenon, evidence of the high qualifications of the judiciary. Moreover, the legislator materially encourages the presence of degree level, but only by specialty 12.00.00 according to the nomenclature of scientific specialties, or academic title – without defining the discipline, that is, as such. According to article 19 of the Federal Law "On the Status of Judges in the Russian Federation", the judges, who hold the degree of Candidate of legal sciences or academic title of associate professor, receive additional payment in the amount of five percent of the salary, and the judges, who hold the degree of Doctor of law or academic title of professor, – 10 percent of the salary.

As for the concept of "other creative activity" used in article 3 of the RF Law "On the Status of Judges in the Russian Federation", the legislation does not define its types. In the literature under creative activities is defined human activity, aiming for creation of new spiritual and material values [6, 593].

In part 1 of article 44 of the Constitution of the RF the concept of "creativity" covers literary, artistic, scientific, technical and other forms of creativity. Current legislation defines creativity only in the sphere of culture. Under paragraph 5 of article 3 of Fundamental principles of legislation on culture by creative activity in the field of culture is considered creation of cultural values and their interpretation. Under cultural values are implied norms and patterns of behavior, works of culture and art, results of research of cultural activity, etc.

It should be borne in mind that judges can exercise their right to engage in gainful creative activity both on a professional and non-professional basis. This does not require the formal status of a creative worker. Professional and

non-professional creative workers are equal in the field of copyright and related intellectual property rights, protection of secret skills, freedom of disposal the products of their labor, government support, etc.

In relation to judges in practice under scientific and creative activities commonly understand preparation and publication of scientific monographs, papers, articles, reviews; researches (experiments, observations, experience practices, etc.) and creation of developments; participation in scientific conferences, symposia, “round tables”, research and practice seminars, etc.; participating in the work of creative teams to analyze different issues and development of recommendations, etc.

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