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MASTER'S PAPER

FURTHER PERSPECTIVES FOR DEVELOPMENT OF SPECIALIZED JUDICIARY IN ARMENIA

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I N R O D U C T I O N

After the collapse of USSR and declaration of independence the Republic of Armenia faced critical social - economical reorganizations. Neither former Soviet legal nor state institutional systems were capable of facing such changes any more, thus, the need for legal – institutional reforms became an emergency.

By the adoption of RA Constitution in 1995 and the subsequent amendments of it in 2005, where *inter alia* the principle of checks and balances of the legislative, executive and judicial powers was stated, the priority of human rights and dignity was declared, In addition, huge pressure made by international obligations coming from RA's membership in different international organizations (treaties) started "the era of profound reforms" in Armenia.

As a result of those reforms in correspondence with the Constitutional requirements and international laws and regulations about the establishment of a democratic and a legal state, some totally new state institutions were founded in Armenia such as State Revenue Committee, State Commission for the Protection of Economic Competition, State Committee of Real Estate Cadastre, etc.

As Armenia, even nowadays, is mostly inexperienced in the areas of newly established state institutions that are assigned to deal with, their further operation brings a huge amount of legal problems and judicial disputes most of which are concern the breach of even fundamental human rights and freedoms guaranteed by both national and international legislation.

Just as Universal Declaration of Human Rights and European Convention on Human Rights ratified by Armenia, RA Constitution also granted everyone under RA jurisdiction the right to protect his/her rights by independent and impartial court within a reasonable time, thus the issue

of establishment and further development of qualitatively more effective judicial system which will be able to enforce these rights, becomes extremely important for Armenia.

Taking into consideration all the above mentioned, I decided to dedicate this research to the issue whether Armenia is in need for specialized judiciary at all, would it be really useful, and is it possible to establish an effective institutions of specialized judiciary in Armenia in such a way that these can serve as another effective guarantee for judicial protection of human rights and fundamental freedoms, taken into considerations the limited budgetary resources of the Republic of Armenia.

As a matter of fact , nowadays both the RA Administrative Court and RA First instance Common Jurisdiction Courts (and as a result Court of Appeals and Cassation Court) are overloaded with cases concerning real estate, that is why in the subsequent chapters the above mentioned issues are analyzed from that perspective. In other words, in order to provide proper background for effective research of major issues raised in this paper the real estate law as the most disputed and one of the most complicated legal fields in Armenian courts is taken.

THE NEED FOR SPECIALIZED JUDICIARY IN ARMENIA

Historical Review of RA real estate law development.

In order to assess the need for specialized judiciary in area of real estate law we may discuss the preconditions that determined complication of that legal field in context of real estate registration model that RA established.

We should remember that those preconditions were absolutely unique because of dramatic events that newly independent Armenia faced in 1988 and the beginning of 90's .

First - earthquake, then influx of refugees from the neighboring Azerbaijan which resulted into the existence of the significant number of the displaced population thus the shortage of dwelling for population became a critical issue. In other words, the demand for permanent housing has overwhelmed the supply of such housing [1].

Second – as a matter of fact, it was a time of profound social-economical transformations which were escorted with appropriate legal reforms, especially in the field of real estate. In order to understand the keen controversies between the legal requirements of new economical systems and Soviet legal regime of real estate it is enough to notice that according to Article 11 of the ArmSSR Constitution of 1977, land comprised the sole property of the state and thus could not be subject to sale, i.e. it could be possessed and used but not disposed of - this mostly contributed to formation of unique legal regime for real estate in Arm SSR.

All the above mentioned led the newly independent Republic of Armenia to adoption of strict laws and an unusual mechanism of real estate registration with an aim to protect property rights of all RA citizens as much as it was possible.

1.Transformation of housing rights in Armenia:1988-2002, T.Janoyan, Yerevan 2002, page121:

I think, this directly resulted to the vitally necessary complication of legal norms and institutions regulating relations related to real property. That complication and the reality of having mostly non competent executive officials itself resulted to the practical situations, when RA citizens in order to make registration, to accept inheritance or to divide their immovable property would rather apply to judicial institutions then to other state institutions hoping to have their problem solved within reasonable time and without disproportional expenses.

But as it is presented in subsequent subchapter judicial institutions in current format are also "not well prepared" to fully manage that kind of work with those criteria (solution of judicial disputes within reasonable time and without disproportional expenses).

The difficulties that judges may face while considering real estate cases.

Nowadays Armenian judges from both RA Administrative Court and RA Common Jurisdiction First Instance Courts while considering real estate cases face some problems related to very narrow legal and even some extra legal knowledge that results to disproportional prolongation of judicial disputes and violation of RA citizens rights of having judicial protection of violated rights "within a reasonable time" guaranteed by Article 19 of RA Constitution and Article 6 of the European Convention on Human Rights.

For example , judges, growing number of which are post soviet graduates, in order to understand the "legal history" of concrete real estate object while solving, for instance, a judicial dispute related to real estate registration, should be aware of the substance of such "extinguished" legal institutes as different types of housing stocks (state; public; cooperative; individual), orders and priorities of allocation of housing, housing space quotas, the warranty of residence, reservation of housing, exchange of housing etc., which existed while "Soviet era". Furthermore, regulation of real property relations during the so called "transition period" (1988-

1992) and “transformation period”(1992-2002) was managed by a number of different legal acts, which even do not have legal power any more, but have left their “footprint” on legal history of almost every real estate object. For instance, such legal acts were the resolution # 272 “On Selling Apartments of State and Public Housing Stock to Citizens as Personal Property” adopted on 13 June, 1989 by the ArmSSR Council of Ministers and the Trade Union Soviet of Armenia, which enabled the ArmSSR Ministers, Departments, Executive Committees of Town and District Soviets of People’s Deputies, enterprises, institutions and organizations to sell the apartments occupied by them as personal property to citizens starting from July 1, 1989; RA law “On Property in the Republic of Armenia” (1990) which aimed at establishing legal grounds for the formation of a market economy, the consolidation of the business system and property, as well as the development of different types of property, until the systematization of the civil legislation, for the first time in the Republic of Armenia this law legally provided for the allocation of land to citizens with the right of ownership(the Law on Property, Article 11) or RA Land Code adopted in which stipulated that “Plots of land attached to houses, as well as the plots of land used by the RA Citizens for gardening (building a summer cottage) and for constructing a house and providing utilities for it, shall be granted to them free of charge as ownership.”[2]

Cases related to real estate registration also required from judges a very narrow specified legal knowledge of current governmental laws and regulations as well as judicial opinions and decisions of RA Cassation Court related to real estate law.

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2. RA Land Code. 1991, Article 11:

In fact, most of the real estate cases require expert examination in order to clarify issues requiring specialized knowledge which arise during case and as a result the judges should make a decision on the basis of expert opinions delivered by technical experts, those opinions are written in very technical language and in order to understand those opinions judges with only legal background should also have a minimum package of technical knowledge, otherwise they should ask for expert interpretation for every single word and idea written in expert opinion which will lead to disproportional prolongation of cases thus to violation of the principles of fair trial within a reasonable time and especially the principles laid down in article 6 of the European Convention on Human Rights which according to European Commission for the Efficiency of Justice (CEPEJ) is one of the most important aspects related to a proper functioning of courts. CEPEJ states that fair trial within reasonable time must be brought into relation with the workload of a court, the duration of the proceedings, specific measures to reduce their length and improve their efficiency and effectivenss[3].

I agree with the statement that there are a lot of other more complicated legal fields such as e.g. securities, insurance etc., but as a matter of fact, nowadays the Armenian judiciary system is loaded with cases directly or indirectly connected with real estate (immovable property), and in order to prove this I am referring to statistical data reflecting types of cases heard in RA courts. Thus, according to the letter from the first deputy head of RA judicial department N. Karapetyan during 2009 and 2010 (up to 15.11.2010) in RA administrative and first instance common jurisdiction courts 104335 cases were reviewed from which 8812 cases (8,4%) were related to immovable property,

3. European judicial systems, Edition 2006 (2004 data); Edited by European Commission for the Efficiency of Justice(CEPEJ), Belgium 2006, page 85.

3486 (3.3%) were divorce cases(where the problem of immovable property division could also be considered), 1859 (1.7%) - cases related to contractual disputes(some amount of which is also related to real property), 1766 (1.6%) - cases concerning the adoption of legal facts, 3828 (3,6%) - cases of payment orders[4].

Furthermore, because of their technical complication the real estate cases are also most often delayed and reappointed cases, for instance according to "DataLex" which is an electronic management and public information provision system which allows receiving real-time data regarding court cases at all the courts, as well as provides other types of services, in October 2010 in RA Yerevan city's Kentrron and Norq-Marash common jurisdiction first instance court 156 appointed hearings out of 930 (approximately 16%) concerned to real estate[5].

For further argumentation of the points raised in this paper a couple of practical cases related to real estate are presented below where examples of problematic situations deriving from incompetence of judges are shown.

a) Case X vs. the municipality of Yerevan, claim- the partial annulment of Yerevan mayor 's decision N 2, heard by RA Administrative court.

Issue - Yerevan mayor's decision N 2 annuls, another (previous) decision N 1 by which a peace of land from Yerevan municipality's balance is granted (without compensation) to citizen X.

The reason for such an annulment is the letter given by State Committee of the Real Estate Cadastre stating that citizen X has a document in his Cadastral case related to some part of the lend which is factually used by him.

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4. Letter Ъ-8074 Nov.24. 2010 from RA Judicial department.
5. http://datalex.am/dl_hearings.php?

Rule – According to RA law on " Private dwellings in Yerevan city which documents are not preserved" – RA citizens who has occupied up to 300 meter squares of land from Yerevan municipality's balance, before 2001 without any legal basis, is considered as the proprietor of that land, in other words that land is granted to that citizen free of charge if he/she doesn't have any document on it.

Analysis – Thus, from the first sight the annulment of decision N1, which /grants the citizen X a peace of land free of charge is legal, as citizen X has a document related to that land in his Cadastral case.

But the reality is that document is related to totally different part of land- not the peace of land which was granted free of charge to the citizen X. In order to understand this it was enough to have a look on map of the territory which was used by citizen X and to understand it.

Conclusion – The claim was rejected by the court, as judge did not have a minimum knowledge needed to read and understand the map presented to him by citizen X (the motion of the applicant to send the case to expertise was also rejected).

b) a Case A vs. B, claim- the restitution of the land from illegal possession, heard by RA Arabkir/ Qanaqer-Zejtun first instance common jurisdiction court.

Issue – In 1947 (soviet period) the same land was granted to two different persons. The question before the court is to decide who has priority over the land nowadays.

Rule – According to soviet legal doctrine the land only belongs to the state. State can never grant the land to the individuals as their property, it can be granted only as "usufructs".

Analysis – As the land wasn't granted as a property, state was able to take back the land and grant it to another person without any limitation. And in our case in order to decide whom the land

belongs right now, the judge should have a look on date when the land was granted and the person whom the land was granted later has priority over another person.

Conclusion – The claim was rejected by the court, as judge did not have enough legal knowledge of soviet legislation, and considered that the land was granted as a property, as the property can not be taken back by another decision of granting state institution, thus the person whom the land was granted first has priority over another.

Armenian judicial system is mostly overloaded with cases related to real estate and those cases in practice really bring problems to the judges which resulted to the violation of RA citizens rights and basically this is the right of having fair trial within a reasonable time guaranteed not only by RA Constitution but also by European Convention on Human Rights.

The factual reality is that not a single University or educational institution in Armenia nor elsewhere in the world provide educational program that could solve the problems unexhausted list of which is presented above, thus even the best law graduates, with fine legal work experience would face difficulties while solving disputes concerning real estate. That is why I think that the formation of some kind of specialized judiciary in Armenian judicial system which will deal only with cases related to real estate can be effective solution for at least some part of problems.

SUGGESTED MODEL OF SPECIALIZED JUDICIARY FOR ARMENIA

Seek for specialized judiciary while implementation of judicial reforms in Armenia and the understanding of the idea of specialized judiciary in courtiers with completely different legal culture such as US.

After adoption of RA Constitution in 1995 and joining to different international organizations Armenia, among other things , started the process of reformation of its judicial system which as it is mentioned above was no longer able to go on with new social-economical order.

First of all, the appropriate legal basis was created – in 1998 laws on "Formation of Courts", "Judge Status", "Prosecution", "Solicitor Service", "Court of Arbitration and arbitration procedures", "Compulsory implementation of judiciary acts", "Service providing the compulsory implementation of judiciary acts", RA Codes of Criminal and Civil Procedures, RA Civil Code passed by the National Assembly of Armenia started the first phase of judiciary reforms in RA[6].

During the first phase of implementation of judicial reforms in 2001 the Court of Arbitration was established, It was covering very narrow–specialized jurisdiction, which unfortunately was not able to fully touch upon the problem of professionalized courts.

By the constitutional amendments of November 27, 2005 and RA Judicial Code (pronounced in April 18, 2007) the foundations of the second phase of judiciary reforms were laid in RA.

Article 92 of RA Constitution stipulates that the courts operating in the Republic of Armenia are the First Instance Court of General Jurisdiction, the Court of Appeals, the Court of Cassation, as well as specialized courts in cases prescribed by law.

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6. http://www.court.am/?l=en

Analyzing this provision the head of RA Cassation Court Mr. A.Mkrtumyan stated that comparison of different countries' judicial systems shows that there is unanimity neither in types nor in jurisdictions of specialized courts. Although it is possible to underline some reasons behind the existence of specialized courts

1. foundation of separate courts because of personal characteristics (e.g. juniors courts in France),
2. incorporation of previously non judicial institutions into judicial system (e.g. administrative court in France, mediation courts in RF),
3. specifications of some cases (e.g. transportation courts in US)[7].

Based on the above mentioned Constitutional Courts of Universal Jurisdiction, Civil Courts, Criminal Courts and Administrative Courts were established in 2008, Court of Arbitration was abolished.

With amendments to RA Judicial Code (2009) the phase or sub phase of judicial reforms in RA had started. Civil and Criminal courts were abolished, their functions were transformed back to Common Jurisdiction First Instance Courts distributed in almost all urban areas of the Republic of Armenia. Administrative Courts, Courts of Appeal, Cassation Court with their prior functions have been preserved. As a matter of fact those reforms are still going on and the indicator of that fact is that on 1 December functioning of a new judicial institution – Court of Appeals for administrative cases starts.

7.Commentaries to the Constitution of the Republic of Armenia; Edited by G. Harutyunyan, A. Vagharshyan, Yerevan, "Iravunk" publishing house, 2010 page. 904 Article 92 interpretation

Summarizing the information presented above we can infer that Armenia from the very beginning of judicial reforms was aware of the need for specialized judiciary as an effective mechanism for protection of “rule of law” in newly independent post soviet country.

As indicator of that are the facts of establishment of the Court of Arbitration in 2001 and a further elaboration of that specialized courts system in 2008.

The idea of specialized judiciary in form of specialized courts is also acceptable in US where such courts are considered as “hybrid institutions”. The reason for such unique understanding of that institution, which, as I think is very important to analyze in this context, is the fact that in most respects they resemble other courts. But their focus on relatively narrow set of issues also gives them characteristics that are more typical of administrative agencies. One reason is that agency officials with specialized responsibilities often develop narrow and parochial perspectives. Another reason is the special opportunity for influence that an interest group gains when an agency deals continuously with that group’s area of concern. Specialization can have similar effects on courts. I think that such understanding comes mostly from the core fact that US is a nominal common law country where judicial institutions are really capable of calling into live issues coming from interest groups, but, I think that Armenia should also be careful with this because, even being country with Continental European or Civil law legal culture, as it also has article 15 of RA Judicial Code as a cornerstone for its judicial system, which is nothing than a direct legal “injection” of institute of judicial precedent into our legal reality.

Partly for this reason, in US many members of Congress are suspicious of specialized courts, and the Congress has rejected a good many proposals to create them. But some proposals have been accepted, largely because they seemed to offer important advantages: the expertise of judges who specialize in a technical field such as tax law, the opportunity for a single court in a

field to avoid the legal conflicts that developed among District Courts or Courts of Appeals, and reducing the caseload of generalist courts. And officials in the federal government or groups in the private sector sometimes have anticipated that a specialized court or courts of appeals. The cumulative result has been to make specialized courts a major part of the federal judicial system, handling issues as important as patent rights and international trade[7].

Thus we should notice that some of the reasoning for justification of specialized judiciary is actual for Armenia for example the real estate cases, as it is already mentioned above, require the expertise of judges who specialize in a technical field and the reasoning behind reducing the caseload of generalist courts is also an important issue as the statistical data presented in previous subchapters indicate that Armenian courts are mostly loaded with cases related to immovable property.

In the next section some aspects of shortcomings of the specialized courts established in Armenia while 2008 are presented and analyzed which as I think contributed to the abolition of it after one year of implementation.

The conclusions we can make from the first experiment of establishment of specialized courts in Armenia.

While analyzing the process of judicial reforms most of us will wonder why those specialized judiciary institutions as civil and criminal courts were established and than abolished.

I know that there are lots of points on this question and one of them, I think, that resulted in their ineffectiveness, was their distribution. For example, there were three Civil Courts - Civil Court of Yerevan, Northern Civil Court, Southern Civil Court.

7. American Courts Third Edition; Edited by Lawrence Baum. Ohio Stet University, 1994 page.39 :

The judicial territory of the Civil Court of Yerevan is the administrative territory of Yerevan.

The judicial territory of the Northern Civil Court includes the administrative territories of Shirak, Lori, Tavush, Aragatsotn, Kotayk, and Gegharkunik Marzes. The judicial territory of the Southern Civil Court includes the administrative territories of Ararat, Armavir, Vayotz Dzor, and Syunik Marzes. Article 27 of RA Judicial Code states that Civil courts shall have substantive jurisdiction to hear civil cases based on claims the value of which exceeds 5,000-fold the minimal wage, in other words, 50,000 ADM, as well as other non-property cases stipulated by procedure law plus bankruptcy proceedings that shall be administered by Civil courts. Taking into consideration the fact that the cases in Civil Courts were heard in substance, both applicants and respondents had to be present while judicial proceedings in order to effectively protect their positions according to principle of adversarial proceedings stated in article 17 of RA Judicial Code, it is enough to have a look on RA's administrative-geographical map to understand that such a distribution of specialized courts will result to the situation where an average statistical RA citizen for example from Meghri who had to apply to Southern civil court which was located in Eghegnadzor in order to protect his/her violated rights, the judicial proceeding might continue for several months, the applicant (or the respondent) had to manage a quiet a long journey to get to the court which was connected with unproportional expenses and other difficulties because of underdeveloped infrastructure of that regions thus, as I think many potential applicants will refrain from applying to the Civil Court.

That is why in next subchapter I will suggest a model of specialized judiciary that will at least solve the problem that I presented above.

Specialized judges in common jurisdiction courts.

As it is mentioned above in 2009 the Civil and Criminal courts were abolished, Their functions were transformed to Common Jurisdiction First Instance Courts. Those judicial reforms have a very good result which is the transformation of RA Court of Cassation into a judicial institution that will provide the uniform enforcement of the law, its correct interpretation, will contribute to the development of justice and will create judicial precedents. But I think that the issue concerning specialized judicial institutes is still "alive" and need to be addressed to. In the first chapter of this paper I considered a question whether the institute of specialized judiciary will be useful in Armenia, after analyzing the specifications of cases related to real estate taking into consideration their huge quantity which is growing day by day I come to a conclusion that Armenia is in need for some kind of specialized judicial institution that will deal with real estate cases and will provide their just and effective solutions "within reasonable time".

And if Armenia is in need for those institutions, then the issue of how organizing them in order to avoid the problems such as one presented above comes forth. Thus I will present a model which, as I think, has certain reasons. That model is as simple as it can be.

- First the special training program for already practicing judges should be adopted and implemented. This type of training could be realized by RA Council of Courts Chairmen on the material basis of already existing judicial school. This will be in accordance with European countries practice many of which have special institutes for training of judges. The Consultative Council of European Judges (CCJE) states that the authority responsible for the training and the quality of the training program should be independent from the executive and legislative power and that at least half of its members should be judges [8].

7. CCJE Opinion (2003) No 4:3

As we all know the RA Council of Courts Chairmen consists of the courts chairmen who are judges. The CCJE also recommends for the training that an independent body should be established, with its own budget and which is able to devise training programs, I think that existing judicial school of Armenia can be considered as appropriate institution from the perspective of CCJE Opinion. What I am suggesting is a compulsory in service training for judges which is also in accordance with European standards as there are 17 European countries where the service training is compulsory for judges[9]. The program of those courses may include review of conceptual issues of legal institutes and regulations that existed during the soviet era or during transformation and transition periods, as well as some class that will provide the minimum technical skills baggage in order to give the judges the ability to fully understand not only legal but only factual-technical specifications of disputes related to immovable property.

- Judges after passing the specialized course, return to their previous courts in order to deal with only real estate cases. Thus we will have specialized judicial institution which will not be specialized court but specialized judges appointed in first instance courts.

Such model will not imply huge expenses of budgetary resources because there will be no need to provide a separate building and stuff for those institutions as it was in case of specialized courts. And as a result we will not only have some compromised specialized judicial institution but it will also be very convenient for average statistical RA citizen to apply to the court and have his case heard and solved within reasonable time by a competent judge.

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9.European judicial systems, Edition 2006 (2004 data); Edited by European Commission for the Efficiency of Justice(CEPEJ), Belgium, page. 113:

This suggestion will probably accept a lot of criticism some of which I have already heard. For instance one is about the enhancing of so called “corruption risks” as for the attorneys who are dealing with mostly real estate cases for instance in small town will be much easier to “make judicial contacts” with the specialized judges and subsequently to have an influence on judicial decision, this is a good point in theory.

But I can bring the following counter arguments: first, I looked on 100 cases from different marzes of RA related to immovable property disputes and in only 3 cases the applicants were represented by the attorneys, in all other 97 cases they represent themselves, second there is a mechanism of rotation in order to combat such problems, which means that judges from time to time can be rotated, I think it is very effective mechanism taking into consideration the fact that all the transportation and dwelling expenses of judges related to their ex officio functioning are paid by Judicial department of RA.

Thus although suggested model is in need for further elaboration, but it also has, as I think, characteristics that are vitally important while providing the opportunity for RA citizens to be protected by judicial institutions effectively, within reasonable time.

C O N C L U S I O N

Summarizing all above mentioned we may made the following conclusions.

After the independence Armenia faced serious social economical problems that pushed our country inter alia towards adoption of complicated legal regulations in sphere of immovable property. Such regulations plus incompetence and high percentage of corruption in executive institutions enforced RA citizens to seek for protection of their violated rights basically in courts. Unfortunately, as I think, it turned out that most of Armenian judges were and are still unable to work under the pressure of such case load and to do not posses enough knowledge both in narrow legal framework regulating the area of real property and in appropriate technical fields, in order not to apply to expertise each and every time when facing a simple technical question.

Thus a model of specialized judiciary is suggested for Armenia, which implies - first training of judges, then their appointment to first instance courts in order to deal only with judicial disputes related to immovable property.

In spite of its controversial nature and need for further elaboration, this model as I think, will contribute to the solution at least some of the problems that RA citizens face while protecting their violated rights by judicial institutions.

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