СУДОУСТРІЙ; ПРОКУРАТУРА ТА АДВОКАТУРА

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НАУКОВА ДИСКУСІЯ З ПИТАНЬ ОРГАНІЗАЦІЇ ТА ДІЯЛЬНОСТІ СУДОВОЇ ВЛАДИ

У статті викладено результати аналізу наукових праць з питань організації та функціонування судової влади, а також засад професійної діяльності суддів в Україні та зарубіжних країнах. Встановлено, що ця проблематика грунтовно розробляється вченими, при цьому, з деяких питань в її межах не вироблено єдиної наукової позиції, окремі її аспекти залишаються дискусійними. Виявлено, що реалізуються різні підходи до визначення категорії «судова влада», проте, переважно, застосовується універсальний підхід, який дозволяє відобразити сутність судової влади з огляду на її функціональне призначення, носія або суб'єкта влади, принципів і форм організації та діяльності, тощо. Констатовано, що не існує єдиної наукової позиції і щодо сутності поняття «судова система», що інколи ототожнюється з поняттями «судоустрій», «судівництво», «система судів», «система правосуддя», або, навпаки, протиставляється їм. Зауважено, що відсутність уніфікованого термінологічного апарату може спричинити ускладнення не лише під час теоретичної розробки цих питань, але й у процесі упровадження результатів відповідних наукових досліджень у практику. Запропоновано розглядати питання організації та діяльності судової влади, як багатоаспектного й багатофункціонального інституційного утворення, з позицій системного підходу. Так, усвідомлення системного характеру цього феномену є умовою проведення комплексного вдосконалення судової влади. З'ясовано, що дискусійним залишається питання структури судової системи, до елементів якої, поряд із судами, відносять і прирівняні до них органи, та органи, створені для обслуговування судової системи, тощо. Не дійшли вчені єдиної думки і щодо моделей судової системи, у тому числі кількості її ланок / рівнів, а також спеціалізації судів та суддів. Встановлено, що етичні стандарти діяльності суддів (стандарти суддівської етики) це – сукупність норм, правил, цінностей, а також особистих уявлень суддів про етику суддівської діяльності, якими керуються судді при виборі моделі своєї поведінки у професійній діяльності та позапрофесійному житті.

Ключові слова: судова система в Україні, моделі судової системи в зарубіжних країнах, захист прав людини, верховенство права, етичні стандарти діяльності суддів.

Ryabovol L. SCIENTIFIC DISCUSSION ON THE POWER OF THE ORGANIZATION AND FUNCTION OF THE JUDICIARY

The article presents the results of the analysis of scientific works on the organization and functioning of the judiciary, as well as the principles of the professional activity of judges in Ukraine and foreign countries. It has been established that this issue is being thoroughly developed by scientists, while a single scientific position has not been developed on some issues within its limits, some of its aspects remain debatable. It was found that various approaches to defining the category «judicial power» are implemented, however, a universal approach is used, which allows to reflect the essence of judicial power in view of its functional purpose, the bearer or subject of power, the principles and forms of organization and activity, etc. It was established that there is no single scientific position regarding the essence of the concept of «judicial system», which is sometimes equated with the concepts of «judiciary», «court system», «justice system», or, on the contrary, opposed to them. It is noted that the lack of a unified terminological apparatus can cause complications not only during the theoretical development of these issues, but also in the process of implementing the results of relevant scientific research into practice. It is proposed to consider the issue of the organization and activity of the judiciary, as a multifunctional institutional formation, from the standpoint of a systemic approach. Thus, awareness of the systemic nature of this phenomenon is a condition for comprehensive improvement of the judiciary. It was found that the question of the structure of the judicial system remains debatable, the elements of which, along with the courts, include bodies equated to them, and bodies created to serve the judicial system, etc. Scientists have not reached a consensus regarding the models of the judicial system, including the number of its levels, as well as the specialization of courts and judges. It has been established that the ethical standards of judges (standards of judicial ethics) are a set of norms, rules, values, as well as personal ideas of judges about the ethics of judicial activity, which are guided by judges when choosing a model of their behavior in professional activity and non-professional life.

Key words: judicial system in Ukraine, models of the judicial system in foreign countries, protection of human rights, rule of law, ethical standards of judges.

Formulation of the problem. An urgent issue at the current stage of the development of our country is the establishment / formation of the national judicial system as an independent, accessible, democratic, one that meets the interests and satisfies the needs of the legal state and civil society, and is consistent with generally recognized standards in this field. One of the conditions for its optimal solution, in particular ensuring the effectiveness of judicial reform, is the scientific justification of the foundations of its implementation. In this regard, the research of domestic scientists on the issues of judicial power and the judicial system does not lose its relevance.

Analysis of recent research and publications. The issue of judicial power is of considerable scientific interest. It is being developed by specialists in the theory and history of the state and law (L. Luts, O. Murashin, Yu. Oborotov, O. Ryhina, T. Strus-Dukhnych, etc.), constitutional law of Ukraine and foreign countries, international law, administrative and other branches of Ukrainian law (S. Bilostotskyi, V. Yehorova, O. Zakharova, I. Ivanochko, S. Obrusna, T. Pustovoit, O. Rosolyak, A. Stryzhak, V. Tatsii, V. Topchii, V. Fedorenko, V. Cheban, E. Chernyak, V. Shapoval, N. Shaptala, etc.), judicial system (V. Bryntsev, O. Burak, V. Horodovenko, M. Kryzhanivskyi, M. Lyakh, I. Marochkin, L. Moskvych, H. Murashyn, I. Nazarov, S. Overchuk, S. Prylutskyi, D. Prytyka, M. Rudenko, M. Savenko, V. Serdyuk, N. Slobodianyk, L. Skomorokha, D. Fedina, L. Fesenko, A. Shevenko, V. Shishkin, N. Yuzikova, etc.).

The purpose of the article is to determine certain debatable aspects of this issue based on the results of the analysis of the scientific works of domestic scientists on the organization of the judiciary and the functioning of the judicial system.

Presenting main material. The provisions of normative legal acts create a basis for understanding the judiciary as a separate branch of government, states D. Fedyna. Her analysis of the scientific output of domestic scientists led to the conclusion that views on the legal category «judicial power» were divided [11, p. 41]. Domestic jurisprudence has developed different approaches to its definition. As a result of their systematization, I. Nazarov established that the content of this category is interpreted through: 1) the appointment of the judiciary and its inherent functions; 2) its bearer is the system of special bodies (courts with specific competence); 3) forms and principles of its organization and activity; 4) determination of the largest possible number of investigated parties and aspects of judicial power (universal approach) [7, p. 8]. The latter approach allows the most complete disclosure of the essence of this legal, political, social, cultural (historical-cultural) phenomenon, which is denoted by the concept of «judicial power».

Most of the relevant definitions are formulated on the basis of this approach. In the interpretation of D. Fedina, the judicial power is an independent, independent branch of state power, which guarantees natural and legal entities the right to a fair trial by implementing a set of powers to administer justice, as well as to ensure the activities of judicial bodies, interpretation of legal norms, rule-making and control powers etc. This concept, the scientist emphasizes, has a broad meaning, which is associated with sufficient institutional capacity, the possibility of independent protection of human rights and interests, and the impact on society as a whole [11, p. 43].

I. Usenko broadly interprets the meaning of this concept. According to the scientist's definition, judicial power is a functionally and institutionally separate sphere of public power; the totality of the powers of courts and other authorized subjects, legitimized by the will of the people or another specific historical subject of legitimation, the content of which is: the administration of justice in special procedural forms with the aim of maintaining law and order, ensuring social harmony and the interests of the ruling classes of society; interpretation of legal norms and control over state bodies and officials [10, p. 32].

Implementing a universal approach to defining the concept of «judicial power», domestic scientists usually use the term «judicial system», while the corresponding context in their works differs. Thus, after summarizing the main essential features of judicial power, I. Hrytsenko and M. Pohoretskyi formulated the following definition: judicial power is an independent branch of power that belongs to the courts that make up the judicial system, the unity of which is ensured by the uniform principles of the organization and operation of courts. Its main tasks are: law-based resolution of social conflicts between the state and citizens, citizens themselves, citizens and legal entities, legal entities among themselves; control over the constitutionality of laws; protection of citizens' rights in their relations with executive authorities and officials; control over the observance of the rights of citizens during the investigation of crimes and conducting investigative activities, establishing the most significant legal facts [3, p. 27].

Agreeing with the fact that judicial power is a broad concept that covers all aspects of judicial legal relations, T. Strus-Dukhnych emphasizes that it should not be associated only with the judicial system, on the contrary, it covers the body of judges, court apparatus, premises, in which courts are located, subjects of organizational and resource support and can be implemented not only through justice, but also through other forms (functions) [9, p. 6].

In the scientific community, there is no single position regarding the essence of the very concept of «judicial system». Sometimes it is equated with the concepts of «court system», «judiciary», «justice system», or, on the contrary, they are opposed. According to M. Fomina, for example, it is unacceptable to identify the judicial system with the system of courts or the system of judicial authorities or judicial instances. In addition, the scientist put forward the opinion that the term «judicial system» historically arose in Soviet times and is inherent in the totalitarian regime, therefore, at the present time it has lost its relevance and evolved into a broader concept – «judicial system» as a set of norms that determine the fundamental principles organization and activities, tasks, internal structure and competence of courts and bodies equivalent to them (arbitration courts, arbitrations), as well as

directly the system of state courts and the system of bodies created to serve this system. She proposes to define the court system as a single, interdependent, hierarchically structured set of courts in the state, in addition, to minimize the use of such terms in scientific circulation as «judiciary», «justice system», «system of courts and judicial instances», «structure of courts» [13, p. 67].

We cannot agree that the term «judicial system» has lost its relevance. It is obvious that the totalitarian regime left its mark on all spheres of life in society, including the judicial system, however, such a complex, multifaceted and multifunctional entity, denoted by this term, cannot be considered otherwise than from the standpoint of a systemic approach. Currently, the opinion of I. Nazarov deserves attention that the judicial system is not a collection of any bodies (state, municipal, other), but rather a system that has close internal connections between elements, is built on the basis of certain principles, unified and mandatory for every court, must meet the requirements of society and the state. The scientist defines two types of connections of this system: internal – between courts within the national judicial system; external – with courts and non-judicial bodies of foreign states [7, p. 11].

It is as a result of maintaining external relations that, as L. Moskvych notes, the judicial system reflects the peculiarities of the organization of the country's judicial power, corresponds to the level of socio-economic development, views prevailing in society on the place of the court in the mechanism of state power, accumulated experience and traditions. The scientist points to such factors of development and formation, formation of judicial systems as: historical conditions of states; the level of social and economic development; form of government and state structure; traditions, customs, mentality of the people, the level of household, professional, political legal awareness, the legal culture of society in general (internal factors); degree of integration of the state into the European and world community, recognition and implementation at the internal state level of democratic principles and standards of judicial power, which ensure the implementation of the principle of the rule of law (external factors) [6, p. 76, 77].

Understanding the systemic nature of this phenomenon is especially important for improving the organization of the judiciary. So far, L. Moskvych has determined the directions of optimization of the judicial system of Ukraine, based on the theory of systems, in particular, the theory of social systems. The scientist characterized the judicial system as a societal open system that interacts with other systems and is an element of the metasystem (society and the state). Therefore, the effective functioning of the judicial system, its production of services for the resolution of legal conflicts depends on obtaining from the external environment the necessary and sufficient resources for high-quality work and proper internal organization, as well as on its stability in a single mechanism. On this basis, the scientist identified two aspects of improving the judicial system: 1) external – optimization of the court's interaction with state bodies, society, at the same time, the state must provide the judicial system with financial, informational, and personnel resources necessary for its functioning; 2) internal – improvement of organizational conditions for the court to properly fulfill its purpose, which involves choosing the optimal structure of the judicial system, solving issues of its centralization-decentralization, introducing the principle of specialization [5, p. 25, 26, 28]. The way L. Moskvich uses the terms «judicial system», «judicial system» shows that she equates them.

Based on the fact that judicial power is a phenomenon that can be considered not only in legal, but also in socio-philosophical and political aspects, the authors of the monograph – [10] also use the terms «judicial system» and «judiciary» as synonyms, instead, the term «judiciary» is used to denote the legal status of judicial power, which is manifested in its interrelated institutional characteristics (judicial system) and legal forms of exercise of judicial power (judiciary) [10, p. 34].

The analysis of the content of the concepts «judicial power», «judicial system», «court system», «judicial system», «judiciary», carried out by O. Bezpala, led her to the conclusion that the all-encompassing concept, which characterizes the peculiarities of the organization of judicial power and the administration of justice with the purpose of protecting the rights, freedoms and legitimate interests of a person and a citizen, legal entities, the state, is the concept of «judicial system», for the definition of which the scientist uses the term «court system». Thus, the judicial system is a component of the state mechanism, a hierarchical, structured and differentiated system of courts, which in their activities adhere to the principles and rules defined at the level of the relevant normative legal acts, are connected and interact with each other to fulfill the tasks assigned to them of tasks [1, p. 9].

When defining the concept of «judicial system», researchers, as a rule, start from a certain main feature or feature of this system. The most justified, I. Nazarov believes, is the definition that emphasizes the nature of the judicial system as an instrument of judicial power, the internal unity and general features of judicial bodies [7, p. 11].

The structure of the judicial system is another debatable issue from the issues outlined in the topic of the article. In general, it is understood as a set of interconnected elements, however, there are different opinions about these elements themselves. Based on the above scientific position of M. Fomina, such elements are courts and bodies equated to them (arbitration courts, arbitrations), as well as bodies created to service this system [13, p. 8]. R. Kuybida, R. Prytyk, L. Sushko, I. Turkina and others are in similar positions.

In foreign countries, L. Moskvych established, a broad interpretation of the judicial system has been formed, in the composition of which three subject elements are distinguished: courts (of general and specialized jurisdiction), quasi-courts and special bodies of judicial power, which administer justice, are differentiated by

jurisdiction and function in system according to a certain hierarchy. At the same time, in the context of the search for the optimal model of managing the judicial system, the scientist points to only one of its elements – the courts [6, p. 79; 4, p. 30].

According to I. Nazarov, the court is the only element of the judicial system. Accordingly, the scientist defines the judicial system as a system of special state bodies (courts), which are the bearers of judicial power, created to meet the need for consideration and resolution of legal disputes, have general tasks, principles of organization and activity [7, p. 11]. Sharing the expressed opinion, O. Bezpala also defines the judicial system as a set of its elements – courts that exercise judicial power on the territory of the state [1, p. 5, 9].

Sometimes scientists in the same work express different views on the structure of the judicial system. Thus, in the content of his candidate's thesis, T. Strus-Dukhnych points out that courts are not the only bodies of judicial power. At the same time, revealing the issue of the principles of organization and functioning, the status of the judiciary, the scientist operates purely with the term «court», for example: «... the principles of the organization and functioning of the judiciary characterize the content of the activity of the judiciary in general and individual courts», «The independence of the courts...», « … courts are not part of any other system of state bodies», etc. In addition, the conclusions from the dissertation state: «Courts form a judicial system, which, like every system, is characterized by its connections and relations between its individual elements (courts), as well as such properties as hierarchy, multi-level, structured» [9, p. 6, 7, 10].

It is obvious that when examining the question of the structure of the judicial system, one should start from the provisions of the legislation. According to Part 1 of Art. 1 of the Law of Ukraine «On the Judiciary and the Status of Judges», judicial power in Ukraine is exercised by independent and impartial courts established by law. In accordance with Part 1 of Art. 3 of the same document, the courts of Ukraine form a single system [8]. It should be noted that in the mentioned act, the legislator uses the terms «judiciary» and «judicial system», however, does not fix their definitions.

Consideration of the judicial system as a set of all courts raises the question of the number of links / levels of such a system, an unequivocal answer to which has not yet been formed in the domestic academic community. According to V. Tatsius, a three-level system of courts is optimal. This position is shared by V. Kononenko, V. Horodovenko, and others. On the other hand, according to B. Gulka, the three-tier judicial system has historically not justified itself. In the context of solving this issue, O. Vinogradova and A. Leontovych indicate that, for example, in Europe there are no discussions about the number of links in the judicial system, since the decisive circumstances of its construction are the ability to ensure the unity of judicial practice [4, p. 75, 79, 80, 84, 93].

Domestic scientists have developed the issue of functional models of the judicial system in sufficient depth, however, the current stage of its development is also characterized by a lack of unity in the relevant scientific positions. Thus, describing the state of scientific research on the foundations of the judiciary in Ukraine and foreign countries, V. Fedorenko states that two main models are mainly distinguished – Anglo-American (Anglo-Saxon) and Romano-Germanic (European, continental), sometimes – socialist and Muslim [12, p. 88]. Taking into account the methodology of the theory of systems and the comparative legal analysis of the organization and functioning of the judicial systems of different countries, L. Moskvych singled out four types of modern judicial systems: 1) Romanesque; 2) German; 3) English; 4) mixed [6, p. 77]. It is obvious that this division of judicial systems is based on the corresponding division of legal systems of states.

I. Nazarov, on the other hand, believes that the type of legal system cannot be used as a criterion for the classification of judicial systems. The scientist justified this position by the fact that the models of judicial systems of different European countries, despite belonging to the same legal family, have distinctive features. His analysis of the formation of judicial systems of the Romano-Germanic legal system testifies to the absence of a single model of the judicial system for all states for all time. Such models existed only temporarily. The judicial system of the country that had a dominant military, political or economic position in the region at one or another period of time was taken as a sample. At the same time, in its pure form, without changes, such a model has never been transferred to another state. Historical and legal traditions of the recipient country, which changed the original judicial model, were always taken into account. The judicial system has particularly significant differences when it comes to the types and competence of specialized courts. That is why, the scientist emphasizes, the classification of judicial systems of different countries should be carried out according to criteria that indicate the specificity of the object of research – the judicial system, and not the state as a whole. Such criteria are: the number of levels of the judicial system and judicial instances, the degree of specialization of courts, the number of higher judicial institutions and the order of administration in the field of judicial activity [7, p. 8, 13].

In response to the urgent need to improve the national judicial system, the question of the structure of the judicial system in view of its mono / polysystemicity, when the system of general and specialized courts function autonomously in the country, headed by its highest courts, was also covered in the researches of domestic scientists. The most common among the latter is the system of administrative justice, the task of which is to consider complaints from private individuals about the decisions and actions of state administration bodies and officials [12, p. 89].

It is the developed system of specialized courts, which is characteristic of most countries of the European Union, that is a means of increasing the efficiency of the judicial system, the quality and accessibility of justice for the population, emphasizes I. Nazarov. At the same time, the types and competences of specialized courts in

different countries lead to significant differences in their judicial system, the scientist continues. At the same time, the functioning of the system of specialized courts does not contradict the principle of the unity of the judicial system [7, p. 15, 16, 19].

Addressing the issue of specialization of courts, the vast majority of domestic scientists agree that such specialization is an achievement of the national judicial system (V. Kuznetsov), the only correct decision of the state (D. Prytika), an important step in the administration of justice, as it provides additional guarantees of the adoption of motivated, legal and fair decisions (E. Yevgrafova). V. Kravchuk also advocates the specialization of courts. In general, while supporting the specialization of courts, Yu. Shemshuchenko warns that absolutization and the distorted embodiment of judicial specialization can lead to negative consequences. Thus, the introduction of complete specialization of the judicial system can cause the rupture of the entire «body» of the judicial power, and as a result, the loss of its independence. The scientist sees that the specialization of courts should be subsidiary, auxiliary to courts of general jurisdiction, and the availability of judicial protection should be ensured in accordance with the rules of a single «entry window». Even more radical is the position of V. Kononenko, who believes that the creation of specialized courts has not improved the state of justice in Ukraine. The judicial system has become cumbersome, and most importantly, there have been obstacles to the consideration of the case by an impartial court [4, p. 85-86, 90]. At the moment, the position of V. Horodovenka, who rejects the specialization of courts in favor of the specialization of judges, deserves attention. E. Yevgrafova also believes that real specialization is carried out by judges, each of whom, based on their professional knowledge, experience and legal awareness, specializes in specific cases and the application of relevant norms of current legislation [4, p. 93, 94].

Regarding the ethical standards of judges' activities or standards of judicial ethics, A. Biryukova and I. Kondratova define them as «a system of universal norms, values, rules and formulas that guide judges in choosing a model of their behavior under specific circumstances, taking into account personal ideas about morality, ethics judicial activity, ideals of justice and the significance of the professional status of a judge in society». These scientists single out three groups of subjects for whom these standards are significant. They are: judges themselves, who in their professional and daily activities must adhere to these standards, which determine the model of their desired or necessary behavior; bodies of judicial power, for which the ethical standards of judges' activity play the role of a regulator through the prism of which the specific situation faced by a judge in his activity is analyzed, evaluated and resolved; a society for which the degree of compliance by judges with ethical standards appears as a criterion for evaluating the judiciary [2, p. 28].

Conclusions and suggestions. As a result of the conducted research, it was established that the issues outlined in the topic of the article, as a subject of research, are thoroughly developed by domestic scientists, at the same time, a unified scientific position has not been developed within its limits on some issues, some of its aspects remain debatable. Thus, views on the legal category «judicial power» were divided. This is explained by the fact that scientists implement different approaches to its definition. Preferably, a universal approach is used, which allows you to cover the content of judicial power in view of its functional purpose, medium, forms and principles of organization and activity, etc. There is no single scientific position regarding the essence of the concept of «judicial system», which is sometimes equated with the concepts of «judiciary», «court system», «justice system», or, on the contrary, they are contrasted. For all the diversity of positions of domestic scientists regarding the relationship of these concepts, it is appropriate and necessary to consider the relevant multi-aspect and multifunctional education from the standpoint of a systemic approach. Only the awareness of the systemic nature of this phenomenon will allow comprehensive improvement of the organization of judicial power. The question of the structure of the judicial system is debatable, the elements of which, along with the courts, include bodies equated to them (arbitration courts, arbitrations), bodies created to serve the judicial system, etc. Scientists have not reached a consensus regarding the models of the judicial system, including the number of its links/levels, as well as the specialization of courts and judges.

The active development by specialists in the theory of the state and law, constitutional and administrative law, etc., of debatable issues within the outlined issues positively characterizes the current state of its research, and indicates the formation of relevant scientific schools. At the same time, the lack of a unified terminological apparatus can cause complications not only during the theoretical development of these issues, but also in the process of implementing the results of research in this field into practice. It is obvious that the scope of the article does not allow to analyze all the debatable issues on the outlined issues. In the context of the ongoing judicial reform, further development is needed, for example, issues of the principles of justice, which are generally recognized but not enshrined in the Constitution of Ukraine, such as: access to justice, etc.

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