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ПОСИЛЕННЯ РОЛІ СУДОВОЇ ГІЛКИ ВЛАДИ, ЯК ВІДПОВІДЬ ВИМОГАМ ЧАСУ

Анотація. *Сьогодні країна неможлива без складної системи органів державної влади. Незважаючи на різноманітність цілей, які стоять перед державою, відповідальність за їх досягнення лежить як на всій державі в цілому, так і на кожній структурі механізму держави окремо. Одним з таких важливих механізмів, за допомогою якого держава виконує свої функції, є судова влада. Тому основна мета роботи полягає у аналізі ролі судової гілки влади та визначенні її місця в сучасній системі поділу влади. Для реалізації поставленої мети, авторами були використані теоретичні методи, які дозволили визначити, що наслідування зарубіжних моделей судової влади не завжди є правильним. Оскільки необхідно враховувати особливості правової та судової систем певних країн. На рівні міжнародних договорів і загальноєвропейських стандартів визначені лише загальні принципи, яким повинні відповідати судові органи кожної європейської країни, та завдання й мета, які поставлені перед судами в сучасній демократичній країні. Автор зазначає, що протягом останніх десятиліть держави Європейського Союзу не зазнавали будь-яких важких потрясінь, здатних кардинально вплинути на планомірне й спокійне еволюціонування судових систем. Це дало можливість країнам ЄС при оптимізації роботи своїх судових органів ураховувати не тільки внутрішньодержавні потреби, а й забезпечити можливість співробітництва судів різних країн між собою. В роботі також розглянуто питання щодо вибору та відповідальності суддів. Встановлено, що система вибору суддів недосконала. Виявлено, що кар'єра судді може бути припинена при досягненні пенсійного віку, через психофізичний стан судді та через вчинення серйозного дисциплінарного вчинку. Також існує суддівський імпічмент, який представляє собою дуже складну процедуру з серйозними гарантіями, які захищають суддю від необґрунтованих дій. В роботі визначено, що процедура імпічменту до суддів застосовувалася дуже рідко, і тільки в відношенні федеральних суддів. У країнах континентальної Європи зазвичай встановлюється вікова межа, після досягнення якої, суддя чи інший чиновник судової влади автоматично виходить у відставку. Висновки, які випливають з даного аналізу, свідчать про зростання ролі судової влади, яка сприяє законності і правопорядку.*

Ключові слова: правосуддя, судовий корпус, виборці, політичні уподобання, судова етика.

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STRENGTHENING OF THE ROLE OF JUDICIAL BRANCH OF POWER AS A RESPONSE TO REQUIREMENTS OF TIME

Abstract. *A modern country is impossible without a complicated system of state authorities. Despite variety of purposes of a state, responsibility for their achievement is on a state in general and on each structure of state mechanism. One of such important mechanisms, using which*

a state performs its functions, is judicial power. That is why the main purpose of the article is to analyse the role of judicial branch of power and to determine its place in the modern system of separation of power. To implement this purpose, the authors used theoretical methods, which allowed to determined that imitation of foreign models of the judicial power is not always correct. Since it is necessary to take into account peculiarities of legal and judicial systems of certain countries. On the level of international treaties and pan-European standards, only general principles to which judicial bodies of each European country should correspond, and tasks and purpose set before the courts in a modern democratic country have been determined. The author notes that in recent decades, state of the European Union have not undergone any serious shocks that could drastically affect the systematic and calm evolution of judicial systems. This gave an opportunity to the EU countries when optimizing the work of their judicial authorities to take into account not only domestic needs but also ensure the possibility of cooperation between courts of different countries. The paper also analyses the issue concerning a choice and responsibility of judges. It has been determined that the system of judge choosing is very imperfect. It has been revealed that judge's carrier can be terminated upon reaching the retirement age, due to the psychophysical condition of a judge and because of a serious disciplinary act. Also, there is judge impeachment, which is a very complicated procedure with serious guarantees that protect a judge from groundless actions. The paper determines that a procedure of impeachment has been used very rarely and only in relation to federal judges. In continental Europe, usually the age limit is set, after which the judge or other official of the judicial power automatically resigns. Conclusions following this analysis demonstrate strengthening role of judicial power that contributes to law and order.

Keywords: justice, judiciary, voters, political affiliations, judicial ethics.

INTRODUCTION

In modern context of development of civilisation, the role of judicial power significantly strengthens. This is caused by the special and peculiar place of judicial power in the general system of separation of power. Strengthening of the role of executive power may lead to that it usurps all branches of powers. The only effective mechanism that can resist to these tendencies is the mechanism of judicial system.

The strategy of development of judicial system in Ukraine (hereinafter referred to as the Strategy) is one of the stages to implement the Strategic plan (SP) of development of judicial power of Ukraine adopted by the XI Congress of Judges of Ukraine, which is the supreme body of judicial self-government. This Strategy is built on strategic goals determined in the SP and at the same time it determines more specific methods, outcome and impact of actions planned.

Adopted in the period of social and political changes, the Strategy is the respond to requirements of new time, striving of Ukrainian judiciary and society for reforming, improvement of quality of services of judicial system, adherence to European standards and approximation to best practices in the administration of justice. In addition, the Strategy reflects the need of society in strengthening independency, accountability and transparency of the judiciary, and at the same time provides for more active cooperation of the judicial system with the legislative and other branches of government. Reform

of judicial system is also necessary precondition to consolidate all efforts towards European integration including the implementation of the Agreement on association and free trade agreement, visa facilitation and other measures in partnership with the European Union.

The implementation of provisions of the Conception of judicial reform of 1992 gave the opportunity to move towards the development of the judicial system and the principles of its functioning: legal consolidation of the independence of judicial power and main principles of its performing, the high status of a judge, his/her special material and social position, implementation of principles of territoriality and specialisation in building the judicial system, development of mechanisms of election and dismissal of judges; self-governing institutes of judiciary have been foreseen and formed; the State Judicial Administration of Ukraine has been created; procedure legislation has been amended, appellate and cassation review of court decisions was introduced; state allocations for the administration of justice gradually increase; some courts have received new premises and money for repairing existing ones; many other measures aimed at improving the material, technical, financial, information and organisational support of judicial activity have been used.

In the process of article writing, the author used writings of modern legal scholars. In particular, R. Lorch and L. Friedman. Also, the material of the European Court of Human Rights, the USA, France, Germany constitutions were used.

The purpose of the article is studying the role and significance of the judicial branch of power at the modern stage of society development.

1. MATERIALS AND METHODS

Correctly organised system of judges is one of the guarantees of fair and efficient justice. The author used different theoretical methods. Using analysis method, it has been determined that each country has its own version of building a system of instances and reviewing court decisions. Each version is conditioned by the necessity to achieve the optimal correlation between two requirements:

1) Justice of court decision – the system of judicial instances should ultimately ensure the legality and fairness of the court decision in the case;

2) the availability and timeliness of a court decision – the system of judicial instances should not be too large, since their passage would be very expensive and unaffordable for parties; a final judgement should be rendered as soon as possible in order to ensure certainty on controversial legal relationships in time (uncertainty has a negative moral and economic impact on the participants in the legal relationship).

Both requirements have a collisional impact on the court system. Justice of court decision may demand more instances, and the availability and timeliness of the decision demand less. In each country system of instances depends on where a legislator sees the middle ground between two requirements.

Method of comparison has determined that the introduction of the stages of judicial reform has resulted in the birth and formation of a system of administrative courts. The author stressed that implementation of such initiatives of judicial system reforming corresponded to European standards more by form than by content. Factually foreign models of judicial systems have been copied without taking into account the peculiarities of the legal and judicial systems of Ukraine. The absence of clear strategical visions of the model of judicial system in Ukraine systematic, consecutive steps in the construction of the judicial system, attempts to solve the problems situationally basing on wishes of the forces that at one time or another were on the political Olympus, have led to the fact that the quality and efficiency of functioning of the judicial system ceased to meet the expectations of society.

Using analysis method and systematization, it has been revealed that implementation of the mechanism of judges' responsibility is impossible without reforming the procedure legislation that would clearly determine tasks of justice and procedural duties of a judge in hearing of a specific case, establish fair and simple court procedure, allow to decide correctly and quickly many cases. In this, participants of a process are denied access to affect fast and efficient restoration of their rights violated as a result of a gross violation of procedural law norms by a judge during consideration of a particular case at all levels and stages. There is no responsibility of the state in the form of compensation for material or moral damage for mistakes in judiciary – in consequence of the consideration of civil, economic and administrative cases.

2. RESULTS AND DISCUSSION

Unlike the executive and legislative branches of government, which are entrusted by the constitutions to the highest state bodies, the judicial power is entrusted to the entire set of courts. Each of regular courts regardless of their place in the general system, resolves specific cases independently, guided solely by law and legal awareness. Each judicial body, not only the Supreme Court of the country, is the carrier of judicial power. It is well-known that a set of courts is called justice from Latin "justitia" – fairness, justice.

It is worth noting that the notion of justice in itself is very relative, shaky and vague. Justice is not an exact legal term and does not have a strictly defined definition. Some researchers believe that there is no justice at all. For example, American lawyer Robert Lorch thinks so. In his book "State and local politics" he writes: "The nature of justice itself is a ghostly, deceptive. You cannot define justice. Justice (fairness) cannot exist. Justice means different things to different people. All parties of the dispute can be right and fair – this depends on how to look from each side. Access to a debate mechanism can help resolve a dispute, but this is not a guarantee of justice. Such a mysterious concept as justice (fairness) cannot exist in this world, but it can be in another" [1].

Nevertheless, activity of courts on resolving legal conflicts is successfully performed and called jurisdictional activity, and space and subject area of such activity is jurisdic-

tion. Exactly jurisdictional activity of courts is practical justice, i.e. consideration of legal disputes and adjudication. Courts are entrusted with the mission of a single, constitutionally-defined body capable of effectively restraining usurpant inclinations on the part of the executive and legislative authorities, as well as defending the violated legal interests of citizens.

Most of the current constitutions of the democratic world adhere to the principle of appointment of judges. It is one of the three methods to form the judiciary. Two other methods include:

1) Election of judges. It is current in some states of America.

2) Mixed method combining election and appointment. It is also in force in some states of America. In this, state governor assigns candidates approved by the legal commission of state legislatures, which determines the level of qualifications of candidates. After that there is election. This method is known in the scientific and legal literature as the "Missouri system."

Appointment and election the same as methods of selection of judges have advantages and disadvantages.

Election of a judge. The system of election of judges has one indisputable advantage. It is that a judge elected in a general election is responsible to voters. Strong humanitarian ties are established between the electorate and the judge.

However, this system has much more disadvantages than advantages. They include the following factors. In the electoral system, influence on candidates by political parties and public organisations is great. Such influence will not contribute to the subsequent fair administration of justice, since the constitutional doctrine assumes the court's action only in accordance with the law. Partisan influence doubts its impartiality. At the same time, a voter, who is forced to make a choice, cannot actually learn about true, professional, and moral qualities of a candidate. Throwing and expensive election campaign will overshadow qualification characteristics of an applicant. In addition, a voter is often driven by a sense of justice, as he understands it. Sometimes this feeling is not formed influenced by knowledge and true facts. The judge should be guided in his activities not by emotions, but by the law. The judge elected in the district, in such conditions, will not be able to ignore an opinion of an electorate, and therefore, will not be able to strictly administer justice. It is impossible to ignore a reputational component of the electoral process. It is unlikely that the spectacle of candidates for judges agitating for themselves and invoking voters for elections will contribute to strengthening the reputation of the court.

Electoral system may injure the feeling of respect for law, justice and courts as bodies who perform it. In such system of selection, individuals who have only eloquence and a certain charisma but not professional qualities, can become judges. If it is necessary to make a choice, a voter often falls under the influence of illusions of external, but not deep factors.

Appointment of judges. The system of appointment is also imperfect. Possibly, its application is expedient at the higher level when recruiting the Supreme Courts. But at the local level, such a system does not always produce highly professional judges. The example of this is American practice. As Robert Lorch wrote: "When judges are appointed, then policy plays a bigger role that professional qualities. Someone said, "A judge is a lawyer who knows a governor." The system of appointment created more bad state judges that federal judges" [1].

The method of appointment of judges often leads to the situation when a candidate is appointed because of motives that are not related to administration of justice at all.

That is why the combination of the method of appointment and the election seems to be optimal for the selection of judges [2]. This combination of the best qualities of elections and appointments will allow to exclude low-qualified candidates.

In practice, this method of forming the judiciary can be implemented as follows:

1. A constitution should establish an independent body similar to Graduate Councils in France, Italy or to special Committees in the USA.

This constitutionally established body should be composed of the head of state, the Minister of Justice, the Prosecutor General, as well as legal scholars and representatives of the country's law schools with the highest international rating. Thus, the theory and practice of law will be combined, the political influence of the ruling elites will be minimised, a high level of public trust will be ensured, and high professionals will form the judicial system.

Selected candidates are appointed to vacant positions of judges for a period of 2-4 years. After that, the judges will run for office in the general election. There are no alternatives, and in essence they represent a referendum on a vote of confidence of the judge. The voter answers only "yes" or "no" in the ballot paper. A judge elected in this way will administer justice for a longer period, participating in the elections in the future, or will personify the law for life.

Judges of second or third instances as well as judges of Higher or Supreme courts are appointed among judges of lowest courts selected or appointed for a longer period of service or for life. Members of constitutionally established Councils of Committees appoint judges of such courts.

Proposed system preserves the best features of methods of appointment and election. At the first appointment of judges, members of a constitutional body can be guided not only by professional qualities of a candidate, but also by political preferences. This criterion will always be present in reality, and it cannot be ignored. At the same time, while running further in the elections, a judge will receive or will not receive support of voters, who will thus express their attitude to him.

In the Old Testament, the selection procedure for judges was assigned to Moses. Thus, in the Book of Exodus, it is said, "…thou shalt provide out of all the people able men, such as fear God, men of truth, hating covetousness; and place such over them, to be rulers of thousands, and rulers of hundreds, rulers of fifties, and rulers of tens.

And let them judge the people at all seasons…" [3]. Modern civilisation has not yet offered an ideal system for the selection of judges. In our opinion, the scheme presented is close to it.

Responsibility of judges. In modern constitutions and organic laws regulating a legal status of a judge, the principle of the irremovability of judges is applied as one of the basic criteria of functioning of judicial power. This formula implies an indefinite or lifelong appointment. However, "lifelong" should not be taken literally. In practice, a judge's career can be terminated upon reaching retirement age. It can be interrupted by a psychophysical state that does not allow justice to be enforced. Judicial activities may also be terminated in connection with the commission of a crime by a judge, a serious disciplinary offence or a gross violation of ethical and moral norms.

Thus, for example, the Basic Law for the Federal Republic of Germany refers to violations of the main constitutional provisions of the federation or federal states as one of the grounds for dismissal of a judge. In such cases, the Federal Constitutional Court on the proposal of the Bundestag solves the matter of dismissal of a judge [4].

The constitution of France of 1958, in article 4 "On Judicial Power" concisely, without saying practically anything about the basics of justice, only states the principle of irremovability: "Judges are irremovable" [5].

Nevertheless, the principle of irremovability should not be overemphasised. And the point is not only that there are meta-legal, quasi-legal or practical possibilities of pressure on the judge to force him to voluntarily resign or take another position. There are a lot of legal restrictions. However, with all reservations, the displacement or transfer of the judge is a very difficult task. Judicial impeachment is a very complicated procedure with serious guarantees protecting the judge from unreasonable bias. For example, in the USA, according to the second part of Section 2 of Article I of the Constitution, federal judges are appointed by the President on the advice and consent of the Senate [6]. Regarding the procedure and grounds for early dismissal, the Constitution contains only one provision, fixed in section 4 of article II [6]. It is worth noting that the procedure of impeachment has been applied to judges very rarely and only in relation to federal judges. The American professor L. Tribe in this regard wrote, "The constitution does not clearly indicate anywhere whether the congress or the president, or both, own the right to remove from office any other appointed officials other than federal judges and subordinate employees."[7;8]. Consequently, the procedure of impeachment cannot be considered even theoretically the primary procedure of removing federal officials. It is unlikely that the chairman of the federal district court could dismiss a judge only with the consent of the senate. Nevertheless, it took a special decision of the US Supreme Court, in which it completely rejected the suggestion that the constitution introduced impeachment as the only way to early dismiss federal officials [9].

Analysis of views of A. Hamilton set out by him at the time in the "Federalist" is very interesting in this regard. The author describes his vision of a role and place of judicial system of the USA headed by the Supreme Court. In the opinion of Hamilton,

the constitutional scheme of judicial power has three main features that determine its relationship with the legislative and executive branches of government. Firstly, the constitutional method of appointment of federal judges involves the participation of the president and the senate in this procedure. Secondly, the judges actually hold their posts for life, because the formula "while behaving well" means the possibility of early removal from office only in accordance with the impeachment procedure. Thirdly, the separation of judicial powers between different courts and the establishment of their relationship with each other. In addition, A. Hamilton considered that the requirement of "good behaviour" as a condition for determining the tenure of judges "is a barrier against incursions and harassment by a representative body" [10]. Exactly irremovability of judges was considered by Hamilton reliable guarantee from against encroachments of legislative and executive powers. "This quality can be rightly considered as an invaluable component in the construction of the judicial system. And also much like the citadel of public justice and public safety" [11].

However, the factor of irremovability of judges also has negative aspects. Lawrence Friedman set them out in brief, "A decrepit or drinking judge, or even a madman, has the theoretical right to remain in office. The government loses dozens of important cases every year and at the same time the regime silently swallows a bitter but inevitable pill" [12]. However, even before being appointed, candidates for judges are very seriously tested, because, according to the Canons of US judicial ethics, "justice should not be administered by a person whose character is incompatible with this function" [13].

It should be added that in the United States, in addition to the impeachment procedure, a judge can also be removed from office for the following reasons:

1. If a judge conducts deplorable actions from the perspective of law and ethic, and for the resignation of a judge voted at least 2/3 of the legislators of the upper chamber of the state legislature;

2. By decision of the State Supreme Court, if provided for by the state constitution;

3. By decision of a special court for the lawsuit about which complaints were filed. In such cases, the Commission of Judicial Qualifications, acting under strict secrecy, participates in the investigation of a complaint. It is explained by the interests of protecting the reputation of judges. investigated complaint.

4. Also, the removal of judges can be conducted due to the deprivation of the licence of a practising lawyer.

5. The removal of a judge by a governor on demand of legislative power;

6. The removal of a judge by the legislative power due to incapacity, i.e. due to the restriction of the rights or capacity of the judge. It goes without saying that this is not the same as impeachment, which means that a judge is dismissed for committing acts that violate the law.

In the countries of continental Europe, usually the age limit is set, after which the judge or other official of the judicial power automatically resigns. Disciplinary respon-

sibility of judges, their career and appointment as well as matter of reorganisation of courts are the responsibility of the special bodies of judicial self-government. How much such organs are important can be judged by their composition. In Italy, for example, in accordance with Article 104 of the Constitution, the High Council of Magistracy consists of the President of the Republic, the Chairman and the Prosecutor General of the Court of Cassation, as well as elected members.

The composition of the High Council of Magistracy in France is approximately the same. It consists of Chairman – President of the Republic; Vice-Chairman – Minister of Justice, six judges, six prosecutors, three lawyers, appointed respectively by the President of the Republic, the Chairman of the National Assembly and the Chairman of the Senate.

The fundamental principles of the functioning of the courts remain unshakable. These include, above all, the principle of the judicial process, that is, strict adherence to the procedure established by law for the consideration and resolution of cases; principle of publicity, that is, publicity and openness of court sessions. We note, in particular, the principle of connectedness of judges only by law, which means not only that a judge should not receive instructions from anyone, including higher courts, but also that regulations subordinate to the law are relevant to court only to the extent that, in his opinion, comply with the law. Legal scholars Yu.P.Ur'yas and V.A. Tumanov wrote in this regard, "In modern complex social reality, the principle of the subordination of a judge to the law remains dominant. But the increased role of judicial practice as a source of law lies behind him; the inadmissibility of "denial of justice" by virtue of the "silence of the law"; the distinction between the law and law that has penetrated into constitutional texts (Article 20 of the Basic Law of the Federal Republic of Germany); increasing the number of unforeseen situations in the field of ecology, medicine, genetics; recognition of the primacy of international law over national law; the presence of so-called violating legislation, legally valid, but contrary to the generally accepted principles of morality and humanity. All these problems significantly complicated the question of the judge's connectedness by law, the limits of his internal freedom, the limits of judicial discretion" [14].

This demonstrates that despite the palette of our world, its history and distinctive features of development, the courts, by administering justice, base their activity on the laws and general principles developed by civilised humanity over the centuries. The order of formation and responsibility of judiciary should be reflected in national constitutions. It is obvious that in modern conditions of development of the system of separation of powers, social responsibility and the political role of the judicial system is increasing immeasurably.

Under these conditions, the delegation of the right to the Supreme Courts to remove judges for committing misconduct, as is the case in some US states, does not seem to be justified. In such cases, it is possible to form closed, narrowly corporate judicial

communities, where manifestation and protection of one's own interests prevail over the universal principle of justice.

That is why, in some cases constitutional bodies who select candidates for judicial posts and thus forming a qualified judiciary can be empowered to remove judges prematurely.

In other cases, special bodies can be formed that empowered by constitution to act in other situations. However, new conditions cannot reject the centuries-old experience of constitutional legal regulation. The irremovability of judges, as a principle, must remain unshakable. Their removal from office can be carried out only if a complicated procedure is complied, which would exclude the elimination of judges under the influence of circumstances of a political or personal nature.

The source of power and sovereignty of the state is people. All actions of authorities are based on this postulate. In the constitutions of France, for example, in article 2 "On sovereignty" this provision is expressed briefly and concisely. In particular, it is said, "The motto of the Republic is "Freedom, Equality, Brotherhood", and its principle is the rule of the people, the people and for the people" [4]. Protection of the interests of people should be the main principle of democratic government. The practical implementation of this principle is reflected in the right of citizens to defend by the court and defend their rights in court. The constitutional right of citizens to protection covers not only the trial itself, but all stages of pre-trial proceedings in a case. The sixth amendment to the US Constitution, adopted in 1791, prescribes that in all cases of criminal prosecution the defendant has the right to the assistance of a lawyer for his defence [6]. Since then, this principle has been incorporated into most constitutional texts, international covenants and conventions on human rights. The European Convention for the Protection of Human Rights, adopted in 1950, in part 3 (c) of Article 6, enshrines the right of a person charged with a criminal offence to "defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require" [15].

CONCLUSIONS

All democratic states profess these principles in the administration of justice. Only justice, as an essential element of general humanitarian fairness, is the goal and means of civil society. The principles of justice are the same for all courts of every democratic country. When dividing the functions of state bodies, only the courts can create an effective balance to other branches.

Representatives of judicial power understand that the primary objective is developments of mechanisms and skills to increase unity of judicial power. The progress towards this slows down the lack of analytical and research capacities of the courts, underdeveloped legislation and search tools for judgments, and the imperfect system of judges'

professional training. Appropriately constructed system of an appellation is very significant factor in order to make possible that the higher courts focus on compliance with the principle of unity of judicial practice. Everyone is interested in the proper functioning of the sphere of justice – from ordinary citizens to representatives of big business. A robust and independent judiciary is necessary for the country that seeks to become a member of a civilised Europe. By adopting the CPCS, the Council of Judges of Ukraine clearly demonstrates to society the readiness of the judiciary to change.

Thus, the theory of the separation of power is enshrined in many constitutions, but specific forms of its implementation quite different. While in some countries the combination of the same organs of the functions of various authorities is considered inadmissible, in others there are different traditions and ministers, as a rule, are members of the parliament. In many countries, the possibility of giving executive power the right to issue laws is excluded. There are countries in which, under certain conditions, the issuance of laws by the executive bodies is permissible.

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