

## Experience of Foreign Countries on Exercising Departmental Control over the Activities of Judges and the Possibility of Its Application in Ukraine

Досвід зарубіжних країн щодо здійснення відомчого контролю за діяльністю суддів та можливості його використання в Україні

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### Abstract

The objective of the article is to study the positive experience of foreign countries in exercising departmental control over the activities of judges and to identify possible ways of its application in Ukraine.

While writing the article the author has used general scientific and special methods of scientific cognition, namely: systematic, comparative and legal, functional and documentary analysis.

Based on the analysis of scientific sources the author has studied the experience of the UK, France, Poland, Asian in exercising departmental control over the activities of judges. It has been determined that quite different approaches have been currently developed in Europe regarding the exercise of departmental control over the activities of judges, which is conditioned by the specifics of the legal systems of countries in general and the judicial system in particular. At the same time, despite the presence of certain differences, this does not exclude the possibility of applying the relevant positive foreign experience in our country.

Based on the results of the conducted research, the following has been suggested, taking into

### Анотація

Метою статті є вивчення позитивного досвіду зарубіжних країн щодо здійснення відомчого контролю за діяльністю суддів та визначення можливих шляхів його використання в Україні. Під час написання статті використано загальнонаукові та спеціальні методи наукового пізнання, а саме: системний, порівняльно-правовий, функціональний та документального аналізу.

На основі аналізу наукових джерел вивчено досвід Великобританії, Франції, Польщі, Азії щодо здійснення відомчого контролю за діяльністю суддів. Визначено, що на сьогоднішній день в Європі склалися досить різні підходи щодо здійснення відомчого контролю за діяльністю суддів, що обумовлюється специфікою правових систем країн взагалі та систем судустрою зокрема. Разом із тим, незважаючи на наявність певних відмінностей, це не виключає можливості застосування в нашій країні відповідного позитивного зарубіжного досвіду. За результатами проведеного дослідження з урахуванням зарубіжного досвіду щодо здійснення відомчого контролю за діяльністю суддів запропоновано наступне:

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account international experience in exercising departmental control over the activities of judges: a) to optimize the system of entities, which are authorized to exercise control over the activity in the specified sphere; b) to create a legislative base for exercising departmental control over the activities of judges, in particular by developing and adopting a single legal act in this area; c) to strengthen the supervision over the courts while maintaining the limits of the independence of judges; d) to expand the financial and logistical support of the entities of departmental control; e) to create organizational and legal conditions, where judges will in no way be able to influence the departmental control; f) to develop a clear and understandable system for evaluating the performance of judges.

**Key words:** departmental control, international experience, judicial authorities, a judge, legislation, a subject of control.

## Introduction

Realization of material legal relationship is reached by means of will of the parties on the basis of the current legislation or the agreement of the parties. At the same time, regulatory legal relationship cannot always be to provide the normal course of realization of material legal relationship, for example, owing to violations of one of the parties of conditions of the obligations legal relationship which developed between the parties (Safin & Nurie, 2019, p. 439), which indicates the significant role of the judiciary in resolving such disputes.

The administration of justice in each country is the foundation of that government, and governments are required to exercise effective oversight over the administration of justice, including the administration of justice, in all its dimensions, including social justice and its own survival (Rahmati, Sheidaieian, MirKhalili & Darabi, 2019, p. 189).

The analysis of the scientific literature and norms of the current legislation of Ukraine makes it possible to state that the legislator is moving quite slowly towards improving the departmental control over the activities of judges. All this requires finding alternative ways to improve this legal institution, one of which is the study of international experience. After all, the study of international experience, it is like a surrogate of an experiment, which is impossible within law in its purest form, it allows to identify the aspects that can be adapted in the process of national

a) оптимізувати систему суб'єктів, які уповноважені здійснювати контрольну діяльність в окресленій сфері; б) створити законодавчу базу для здійснення відомчого контролю за діяльністю суддів, зокрема шляхом розробки та прийняття єдиного нормативно-правового акта у цій сфері; в) посилити нагляд за діяльністю судів, зберігаючи при цьому межі самостійності та незалежності суддів; г) розширити фінансове та матеріально-технічне забезпечення суб'єктів відомчого контролю; д) створити організаційні та правові умови, за яких судді жодним чином не зможуть впливати на перебіг здійснення відомчого контролю; е) розробити чітку та зрозумілу систему оцінки діяльності суддів.

**Ключові слова:** відомчий контроль, зарубіжний досвід, судові органи, суддя, законодавство, суб'єкт контролю.

rule-making (Kisilev, 2005, p. 11; Sorochyshyn, 2017, p. 98). Therefore, the issues related to the exercise of departmental control over the activities of judges in foreign countries are important in the context of the conceptual reform of the judicial authorities in Ukraine.

## Theoretical framework

The dynamics for the improvement of the current legislation of Ukraine demonstrates the lack of systematicity in the changes and additions that regulate the issues of exercising departmental control over the activities of judges. First of all, it concerns the lack of effective control over the activities of judges of different instances regarding the judgments they take. In this regard, these and other issues related to the departmental control over the activities of judges have been the subject matter of the research in the scientific works of many scholars, in particular, such as: Berendt J. (2019), Berger Peter L. (1973), Chong A. & Cozzubo A. (2019), Ferreira e Silva R. A., Guimaraes T. A. & Sousa M. M. (2019), Hodovanets V. F. (2005), Kisilev I. Ya. (2005), Kuzmenko O. V., Pastukh I. D., Korystin O. Ye. (2014), Nazarov I. V. (2011), Nestor N. V. (2019), Rahmati M., Sheidaieian M., MirKhalili S. & Darabi S. (2019), Razai S. S. (2018), Safin Z. & Nurie A. (2019), Sereda M. (2016), Sorochyshyn M. (2017), Thilakarathna K.A.A.N. (2019), Visser M. (2019), Yatsyshyn M. (2013) and others have

currently paid attention in their writings to various problems of improving departmental control over the activities of judges. However, despite the considerable number of scientific developments in this area, there are no comprehensive studies in the legal literature focused on international experience in exercising departmental control over the activities of judges. At the same time, the issues of exercising departmental control over the activities of judges were mostly researched either in the context of broader problematic issues – the reform of the judicial system, or in the context of the competence of the entities exercising this function. The above factors, as well as the presence of a sufficiently large number of regulatory novelties, the dynamics of the legislation concerning the activities of judges, make relevant the chosen topic of this article.

### Methodology

This research is conducted using a qualitative method. The research uses primary legal sources such as legislative enactments provisions and decided case law foreign jurisdictions in order to accommodate a comparative study. As secondary legal sources this research uses writings of the highest authority in the field and other comments made on the subject by reputed scholars.

The methodological basis of the article is a set of methods and techniques of scientific cognition. Systematic approach was used as a general scientific method, which provided an opportunity to identify problematic issues regarding the exercise of departmental control over the activities of judges. Comparative and legal method was useful while examining the legislation of certain foreign countries regarding the exercise of departmental control over the activities of judges. Functional method was used to reveal the orientation of the activities of judges in Ukraine and other countries. Documentary analysis made it possible to develop propositions and recommendations for improving the development of national legislation concerning the exercise of departmental control over the activities of judges.

### Results and discussion

The connection between the words “judge”, “work” and “people” is prominent, as these words occurred most often. There is a relationship between the words “work” and “people” indicating the fact that the judiciary is necessary for society, so the work of the judges is directly linked to the people’s desire to resolve

litigation and bring about social peace. The word “people” also refers to the fact that judges themselves are part of society and interact with other people. The judges see their work as an activity that generates value, and, in addition to providing personal financial rewards, contributes to society. The judiciary should be closer to the general public to avoid distortions caused by the media. Social media have played an important role in minimizing this distance from the judiciary (Ferreira, Guimaraes & Sousa, 2019, p. 61). Not only does a well-functioning judicial system support the protection of human rights, facilitate the resolution of disputes, and help hold governments accountable, it also protects property rights, encourages investment, and promotes economic growth (Chong & Cozzubo, 2019).

Judges and courts play a vital role in the development of law and politics in the country. But, despite their importance, there is a gap in legal scholarship about the significance and function of judges across the region. Social constraints and the types of expectations society will have on judges are partly determined by the particular attributes of the society in which the judge works. In other words, the judge’s role is determined by his/her society’s reality. Judges have a social function that is interdependent with their society. This manifests itself in complex arrangements such as judicial systems, judicial roles and judicial identities. Therefore, any understanding of the judge and the judicial function (in the Arab Middle East and elsewhere) ought to consider the assumptions widely held within a particular society about judges (Berger, 1973; Razai, 2018).

It is advisable to start considering the best practices from the leading European countries, including the United Kingdom. Despite numerous judicial reforms, the British judicial system remains at present complex and decentralized. Due to the fact that case law is an essential part of the constitution, the system of higher courts is very extensive. The highest court institution in the United Kingdom is the House of Lords, which reviews the claims of appellate institutions of England and Wales, as well as Scotland (civil cases only). The opinion of the House of Lords is transmitted to the appropriate appellate court, which formulates a decision in accordance with this conclusion (Hodovanets, 1, 2005).

The current system of selecting judges in England and Wales was introduced based on the 2005 Constitutional Reform Act. Prior to this

reform, the system of appointing judges for their positions was relatively simple. Political and legal responsibility for the appointment of judges was carried out by the Lord Chancellor of Her Majesty, who selected the candidates who met the requirements for the positions of judges. The Queen of Great Britain formally appointed judges to their positions. It is interesting that the introduction of the new system was not prompted by an urgent need. The British people admit that the former method of appointing judges worked quite well. Candidates were appointed as judges only if they were worthy of such appointment. There was no way for any political influence. The Lord Chancellor usually acted on the advice of senior judges who were able to identify viable candidates. At the same time, critics of the old system noted the imperfection of the procedure, whereby a member of the government was exclusively responsible for appointing judges. That system also did not comply with the traditional principle of separation of state power, because the judicial power, though formally, was influenced by the legislative and executive branches of power (Sereda, 2016).

Parliament is the key subject of carrying out control over the activities of the main public authorities. Parliamentary control in Britain is based on the doctrine of ministerial responsibility. The essence of this doctrine is that the minister takes responsibility for the activities of his ministry and must resign, if there are deficiencies in the work of the ministry subordinated to him. Parliamentary control has public nature, combined with public control and the institution of political responsibility of the ruling party in the next elections. This is achieved, in particular, by the constant broadcasting of the meetings of the House of Commons. The following forms of control are used in the House of Commons: oral requests; written requests (interpellation); vote of no confidence; the functioning of ad hoc parliamentary committees to supervise the activities of each ministry and the entire government in the whole; Parliamentary Commissioner for Administration. For example, according to the regulations of the House of Commons, a daily meeting (except Friday) begins with an "inquiry hour" (Yatsyshyn, 2013). It should also be noted that complaints about the work of judges in England and Wales are currently being processed by the new Bureau of Judicial Complaints, which is accountable to both the Chief Justice (High Court of Justice in England and Wales) and the Lord Chancellor. The final decision is taken by the Lord Chief Justice and the Lord Chancellor. If a judge

requests a review, a panel of 4 persons is created, where two of them are judges and two – associate judges (who are scheduled by a panel of 20 people, who, in turn, are selected by open contest). The Lord Chief Justice and the Lord Chancellor cannot impose a more severe sentence than the one recommended by the Review Board. If the Chief Justice is to be dismissed, then the Lord Chancellor proposes his dismissal to both Chambers of Parliament, followed by a referral to the Queen in case of support. In case of lower-level judges, the Lord Chancellor dismisses them personally (The English System of Justice, 2014; Nestor, 2019). The next European country that we will pay attention to is France. The judicial system of France is a classic dualistic model and consists of general and administrative courts, which are independent and headed by the Court of Cassation of France and the State Council. When dividing general and administrative courts horizontally, they form three levels. Besides, there is sectoral structuring within the structural organization of each of the levels. There is also a large number of specialized courts, which in most cases have fewer levels. The presence of such a complex judicial system makes it possible to dispute competence and jurisdiction. The Conflict Tribunal has been set up to resolve these disputes. It consists of eight members: each three are elected by the Court of Cassation and the State Council. These six members are elected from among their colleagues in the relevant agency two more members of the Tribunal and two of their deputies. Re-elections are held every three years. The Chief Justice of the Tribunal is the Minister of Justice, but in fact the Tribunal is governed by a Vice-Chief appointed by the Minister of Justice (Hodovanets, 2, 2005).

Considerable attention in France is paid to the evaluation of the activities of judges. Legislative consolidation of the system of evaluation of judges' activities took place in 2005. Conducting an appropriate assessment contributes to the "efficiency and quality of justice in the country. Besides, the value of conducting a proper assessment is that it enables you to evaluate not only professional, but also personal qualities of judges, to encourage them to work better and to develop new approaches to their work. It is important for the evaluation to remain objective, comprehensive, since any assessment depends on the human factor and therefore there is a kind of subjectivity. Thus, an assessment made against a particular judge must ignore the human factor and, in a sense, be impersonal. Such a system of assessment, in the opinion of French scholars, is much better than the rating system, which had

operated in France since May 15, 1850. The old system of rating magistrates has revealed an undue influence of the executive branch on the activities of controlling entities.

It is important to note that the French legislator while developing the outlined evaluation system, paid great attention to ensure the principles of autonomy and independence of judges. Therefore, the guarantees of objectivity of this system of evaluation necessarily went through the fixation of indicators that do not allow deviations towards any personal evaluation. The criteria used were clarified by the order dated from May 12, 2009. The latter emphasizes the value of assessing the professional value of judges. Therefore, the proposed criteria have a variable geometry, since “they depend on the degree of the judge’s position”. In addition to these criteria, which are listed in the annex to the ruling dated from May 12, 2009, the evaluation is formally based on a professional interview report, which includes important headings that allow the evaluator to assess the achievement of goals and results obtained by the evaluated judge (which usually provides that professional goals were set in advance). Another section also allows the evaluator to set goals for the year ahead, thereby recording the assessment in a specific order. Other headings relate to planned training and career perspectives. These numerous criteria or evaluations of approaches indicate the pluralism of the concept of quality of work of judges. In addition to quantitative evaluation, the General Secretariat of the State Council also notes that such goals “must necessarily include the qualitative aspect”, with respect to the section “goals and results”. Therefore, the assessment is not limited to a simple evaluation of the work of the judges, measured, for example, by the number of files processed during the year – on the contrary, special attention is paid to a more “meaningful” approach to quality.

The experience of the Polish Republic deserves special attention in the framework of the presented scientific work. The power in Poland, as in most democratic states, is exercised on the principles of its separation into legislative (parliament), executive (government) and judicial. The judicial power is exercised by free and independent courts (the Supreme Court, courts of general jurisdiction, administrative courts, military courts), as well as tribunals (the Constitutional Tribunal –correspondent to the Ukrainian Constitutional Court and the State Tribunal). This is stated by the Constitution of the Republic of Poland in the Article “The power of courts and tribunals is separate and

independent from other powers” (Kuzmenko, Pastukh & Korystin, 2014).

Nowadays, Poland’s key regulatory act in the area of judicial control is the Order of the Ministry of Justice “On Approval of the Procedure for the Supervision over Administrative Activity of the Courts” (Rozporządzenie ministra sprawiedliwości, 2002). The supervision of the Minister of Justice over the administrative activity of the courts is carried out in relation to: defining and agreeing the directions of supervision performed by the heads of the courts; evaluations of supervisory task plans submitted by the heads of the court; conduct special visits and inspections of judges, supervisory activities of the heads of the courts, offices of district employees of the service, as well as issuing relevant decrees; prepare and analyze annual information on the activity of the courts; control and evaluate materials related to the supervision by the heads of the courts and the issuance of mandatory instructions; organize consultations with judges and other court staff after the visits; assess the qualifications of judges who are candidates for high-level judicial positions in connection with the intention of the Minister of Justice to notify the National Council of Judicial Authorities of this appointment; ongoing or periodic control over the progress of the proceedings in certain cases, if the circumstances that indicate that they are being conducted improperly or in violation of the law are revealed.

An important subject of control over the activities of judges in Poland is the Chief of the Court. The tasks of the chief of the court to supervise the administrative activity of the court include: 1) analysis of the case law in the sent court in terms of assessing the level of its uniformity and request clarification of legal provisions that raise doubts in practice; 2) checking the compliance with the rules of division of cases between judges; 3) analysis of statistical materials concerning the work of supervisory courts, in particular, the status of arrears and efficiency of justice, as well as the efficiency of judges’ work, assessors and judges; 4) control over the work of inspectors and office inspectors; 5) control over the performance of supervisory functions by the heads of departments; 6) current or periodic monitoring over the progress of the proceedings in certain cases, if the circumstances are revealed, which indicate that they are conducted improperly or in violation of the law.

In the context of the issues presented in the scientific work, it should be noted that the ruling party of Poland insists on the development of new legislation that strengthens the control over judges, despite fears of European Union officials that it will undermine the independence of the judicial system and the country's democracy. The bill seeks to ensure that judges do not question the independence of the colleagues appointed by the Board and those controlled by the ruling party. It also aims to punish judges who criticize the government's campaign to rebuild the judicial system or are engaged in "political activity" without specifying what constitutes such activity (Berendt, 2019). Polish people in late 2019, protested in 160 cities across the country to express their anger over the suggested legislation and to force lawmakers to reject it. Poland's Supreme Court has warned that the bill could pave the way for the country's brexit from the European Union in the whole. While such a brexit seems highly doubtful, the European Commission has taken the unusual step of urging the Polish Parliament, the President and the Prime-Minister to suspend all deliberations and to consult with the Venice Commission – a panel of experts on European constitutional law – in regard to the legislation.

The United Nations High Commissioner for Human Rights has warned the leadership of the Polish state that the changes that the legislature is trying to introduce are too much to risk further undermining the independence of judges in the country. In the light of the above, the European Union Commissioner for Justice Didier Reynders warned in Brussels that the rule of law in Poland is being undermined and said that the European Union is ready to do its utmost to protect the independence of the Polish judicial system. Hundreds of judges, lawyers and prosecutors in Poland are already being disciplined for criticizing the government. All of the above has led to the ruling party moving away from intentions to amend the appropriate legislation (Berendt, 2019). So far, Poland's legislation in the field of exercising departmental control over the activities of judges is still unchanged.

Looking at the independence of judges in the context of Asian constitutions, Maartje De Visser noted that at its broadest, the decentralized model of judicial review offers judges opportunities to side-step controversial constitutional questions that are unavailable to the same extent, or at all, to distinct constitutional courts. When deciding on the merits of developmental claims, courts should combine a strong presumption of

constitutionality as far as the substance of the law is concerned with robust scrutiny of compliance with procedural guarantees. Additionally, courts should be better equipped with knowledge about the methodologies used by and insights from other social sciences to enable them to better evaluate extra-legal evidence submitted. This will also make it possible to better anticipate the likely economic consequences of particular judicial findings, possibly with a view to tailoring their remedies accordingly. What is more, the decentralized exercise of review facilitates access to constitutional justice for affected individuals and communities in remote and rural areas, making this the preferred institutional design for constitutional adjudication in large developing countries (Visser, 2019).

### Conclusions

Judicial review, as a discretionary remedy has the strength of being able to take each case upon their relevant merits. Therefore, it becomes paramount that, while having judicial review as the last bastion of hope where every other mechanism fails to adequately protect, the maintenance should come from a supreme force of law, which in most of the instances is the constitution. In considering this, judicial review itself should advocate for the constitutional recognition of rights (Thilakarathna, 2019, p. 22).

Quite different approaches have currently emerged in Europe regarding the exercise of departmental control over the activity of courts (judges), which is conditioned by the specificity of legal systems in general and judicial systems in particular. However, despite the presence of certain differences, this does not exclude the possibility of applying the relevant international experience in our country. In particular, it is advisable, in our opinion to:

- optimize the system of entities that are empowered to carry out control activities in the specified field, since such a system seems too extensive in Ukraine, unlike most of the leading countries of the world;
- create a legislative base for exercising departmental control over the activity of judges (courts) by adopting and developing a single regulatory act in this area;
- to increase the supervision over the courts, but the limits on the independence of judges should not be narrowed;

- we consider it expedient to expand the financial and logistical provision of the entities of departmental control;
- create organizational and legal conditions, where judges will in no way interfere with the progress of departmental control;
- develop a clear and understandable system for evaluating the performance of judges.

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