THE ESSENCE OF INSTITUTIONAL ADMINISTRATIVE AND LEGAL GUARANTEES FOR A JUDGE IMMUNITY

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Abstract. The article is devoted to the definition of the essence of institutional administrative and legal guarantees for a judge immunity, on this basis the definition of promising areas in current administrative and legal legislation development. There is used an approach that administrative and legal guarantees are a specific concept of legal means, methods and conditions which, being applied, allow to ensure a certain state of public relations. Being in their “potential” state also has a protective effect, which can be described as preventive. In the course of the research, institutional administrative and legal guarantees of a judge’s inviolability were identified: impossibility to detain or to be kept in detention or arrest a judge without the consent of the High Council of Justice (paragraph 1, part 1, Article 49 of the Law of Ukraine “On Judiciary and Status of Judges”); impossibility to bring a judge to legal responsibility for the adopted decision (paragraph 2, part 1 of Article 49 of the said Law); the impossibility of using a pretext or forcible delivery to a judge, except for the pretext or bringing it to court (Part 3 of Article 49 of this Law); the presence of a special subject of notification of suspicion of committing a criminal offense – only the Prosecutor General of Ukraine or his deputy (Part 4 of Article 49 of this Law); establishment of exhaustive terms of removal of a judge from the administration of justice in connection with criminal prosecution (Part 5 of Article 49 of the said Law); establishment of a special subject of an application for obtaining a court permit to carry out operative-search or investigative actions against a judge – the Prosecutor General of Ukraine or his deputy, the head of the regional prosecutor’s office or his deputy (Part 9 of Article 49 of this Law); establishment of special rules of jurisdiction of consideration of cases concerning accusation, application of operative-search or investigative actions, precautionary measures against a judge (part 10 of Article 49 of the said Law); determination of a special subject of liability for damage caused by a court – the state (Part 11 of Article 49 of this Law). It is substantiated that the implementation of institutional guarantees of the immunity of a judge is a necessary condition for the proper implementation of all institutional principles of the judiciary. Regarding some principles, these guarantees are a direct factor in their implementation (including the principles of independence, impartiality, justice, rule of law). It is proved that the institutional administrative and legal guarantees of a judge immunity do not have the features of a legal institution in full sense, and therefore they cannot be characterized as a legal institution. However, they have a certain integrity and specificity, as well as a relationship. The legal relations arising in connection with the implementation of these guarantees are characterized by a certain homogeneity, in particular with regard to their object – ensuring the inviolability of a judge. Therefore, the complex nature of institutional administrative and legal guarantees of judges immunity, of guarantees as a separate legal phenomenon is pointed out.
Keywords: legal guarantees, administrative and legal guarantees, immunity of a judge, judge, judiciary, judicial system.

INTRODUCTION

Achieving the impartiality of a judge is a necessary condition for the implementation of specific features of the judiciary, such as independence, focus (protection of subjective rights, freedoms, legitimate interests through conflict resolution, judicial control and some others) (Nazarov, 2020), and the inviolability of a judge is essentially aimed at achieving impartiality, impartiality and fairness of the court (in the case of the constitutional petition of the Supreme Court of Ukraine on the independence of judges as a component of their status: the decision of the Constitutional Court of Ukraine of 11.03.2010 No. 7/2010). The relationship between the impartiality of the judge and the institutional administrative and legal guarantees of the inviolability of the judge as the goal and means of achieving it suggests that the implementation of these guarantees, both individually and collectively, is a necessary condition for modern judiciary.

The studied concept has not received due attention in the pages of scientific literature, but is widely used and established in administrative law research and is “administrative law guarantees” as a category of generic nature. Thus, one of the first studies in which the author's understanding the essence of administrative and legal guarantees is directly formed is the work of E. O. Olefirenko, dedicated to the development of organizational support for the activities of public authorities in the field of realization of human and civil rights and freedoms. The scientist forms the concept of administrative and legal guarantees based on the content of the category “measures”, as well as taking into account the general legal term “guarantee”. On this basis, administrative and legal guarantees are defined as the activities of authorized public authorities aimed at ensuring the rights and freedoms of a man and citizen (Olefirenko, 2006). V. V. Mamochka, working on the issues of ensuring the effective functioning of local governments, provides two groups of administrative and legal guarantees: legal (a set of legal acts on the establishment of legal means of local government) and organizational and legal capabilities of local governments to address local issues (Mamochka, 2010). Similar approaches have been reflected in modern scientific research (Sakun, 2020) (Mahmurova-Dyshlyuk, 2019).

The object of the study is administrative legal relations arising in connection with the implementation of administrative and legal guarantees of the independence of the judiciary. The subject of the study is the essence of institutional administrative and legal guarantees of a judge immunity.

The purpose of the article is to determine the essence of the institutional administrative and legal guarantees of a judge immunity, to determine on this basis the promising areas of development of current administrative and legal legislation.
MATERIALS AND METHODS

The normative-legal acts regulating the relations in the sphere of judicial system and concerning ensuring the inviolability of a judge have been worked out, the practice of their application has been worked out. The work is performed taking into account the general criteria of scientific objectivity, using both general scientific and specifically legal methods of scientific research. The application of the systematic method provided an opportunity to build a research strategy. The application of the formal-logical method allowed to establish the relationship between the key concepts of the study: “institutional administrative and legal guarantees”, “legal means” and so on. The application of the synthesis method in combination with the formal-logical method provided an opportunity to determine specific institutional and legal guarantees of a judge immunity. The application of the formal-dogmatic method made it possible to determine the institutional affiliation of these guarantees. The application of the dialectical method in combination with the systematic method made it possible to trace the connection of these guarantees with all the institutional principles of the judiciary.

RESULTS AND DISCUSSION

The place of institutional guarantees of a judge immunity in the current system of organization of the judiciary is revealed through their relationship with the elements of such an organization. The initial criteria are the features of the judiciary, which determine its place along the legislative and executive branches of government, as well as the principles of the judiciary, which determine its specifics. The inviolability of a judge along with the independence of the judiciary is recognized as one of the leading factors in the administrative and legal support of its activities (Ivanishchuk, 2017).

Awareness of the judge of impossibility of bringing him to justice for the court decision, with the exceptions (Part 1 of Article 49 of the Law “On Judiciary and Status of Judges” of 02.06.2016 No. 1402-VIII (hereinafter - the Law “On Judiciary and Status judges ”) (On the Judiciary and the Status of Judges: Law of Ukraine of 02.06.2016 No. 1402-VIII,” 2016)), contributes to his lack of interest in the case, creates a basis for resolving the case on the basis of fairness, integrity, taking into account the current legal norms, promotes the perception of this decision by society. As a result, it allows to characterize the judiciary as independent in nature. At the same time, the perception of a particular court decision by society is an important factor in the legitimacy of the judiciary, public confidence in it (Organization of Judiciary and Law Enforcement, 2013). In view of the above, the features of the judiciary should not be characterized as a whole, but as a system with close links between its elements. This means that each individual guarantee of a judge immunity is realized not only in any specific feature of the judiciary, but in all of them in general, as well as in the relations between them, i.e. in their system. At the same time, such a feature of the judiciary as its situational nature is revealed, which is revealed in its main purpose: administration of justice (Organization of Judiciary and Law Enforcement Bodies, 2013), (Yarova & Matveevsky, 2020). Guarantees of a judge’s inviolability not only contribute to the quality of his or her decisions, but also create confidence in his or her objectivity and legitimacy in society, as it excludes the influence of the opposing party on the judge.
Institutional administrative and legal guarantees of a judge immunity are conditioned by the willful nature of the judiciary, which consists of making a court decision on a specific case, in material form (document). Volitional character is considered as a general feature of the judiciary, i.e. one that is inherent in other branches of government, but in relation to the judiciary is characterized by its own content. Other general features of the judiciary are also expressed in this guarantee: social character, structure of power relations, purposefulness, regulatory and organizational purpose, coercive character, as well as special features of justice (Organization of Judicial and Law Enforcement Bodies, 2013), (Varova & Matveevsky, 2020).

The elaboration of scientific positions on the definition of the concept of administrative and legal guarantees indicates a certain dynamics of scientific understanding of this concept. In particular, E.O. Olefirenko (2006) proceeds from the understanding of guarantees as the activity of authorized entities. V.V. Mummochka (2010) defines administrative and legal guarantees as: 1) a set of regulations; 2) capabilities of authorized entities. D. I. Sakun (2019) understands the administrative and legal guarantees of free legal aid by lawyers as a set of conditions, means, and ways to ensure this benefit (Sakun, 2020). Each of these approaches develops the previous one, and more and more accurately reflects the essence of the legal phenomenon of administrative and legal guarantees. However, remarks can be made about each of the outlined approaches.

Thus, in the modern theory of law guarantees of human rights there is determined the system of tools and institutions (both general and special legal) aimed at protecting, protecting and promoting the implementation of these rights (Petrishin, 2020). Thus, E. O. Olefirenko in his definition, does not reflect the static aspect of administrative and legal guarantees, defining them exclusively as an activity. V. V. Mummochka and D. I. Sakun, as a whole, properly reflecting the essence of the category in question, state its systemic nature.

Administrative and legal guarantees are characterized by features that distinguish them from administrative and legal means: a strong connection with the specific legal institution within which they exist; dynamic nature. Manifestations of such connection include: targeting within a particular legal institution; conditionality of legal facts in a particular area. (Sakun, 2020). In addition, guarantees are more complex, systematic than legal remedies.

Institutional material administrative and legal means of ensuring the immunity of a judge (impossibility to detain a judge or detain or arrest him without the consent of the High Council of Justice) (paragraph 1, part 1 of Article 49 of the Law of Ukraine “On Judiciary and Status of Judges”); legal liability for the decision (paragraph 2 of Part 1 of Article 49 of this Law) and others meet these criteria of legal guarantees. Thus, the impossibility of detaining a judge or holding him in custody or arrest without the consent of the High Council of Justice is ensured by a range of remedies: defined in the Law “On the High Council of Justice” and in the Rules of Procedure of the High Council of Justice. / 52 / 0 / 15 - 17 (hereinafter - the Rules of Procedure of the High Council of Justice) ("On approval of the Rules of Procedure of the High Council of Justice: decision of the High Council of Justice of 24.01.2017 No. 52 / 0 / 15 - 17, “2017) giving appropriate consent; statutory liability for interfering in the activities of a judge as a subject of justice and for contempt of court, etc. Therefore, this remedy is complex. Both these and other institutional administrative remedies are aimed at
achieving a single goal – to ensure the immunity and, ultimately, impartiality of a judge in the administration of justice. These tools are quite specific in the field of legal relations, as well as – have a dynamic nature, which is manifested in the existence of legal procedures for their implementation.

On October 5, 2021, the GRP made a decision on taking measures to ensure the independence of judges and the authority of justice, according to the judge of the Central City District Court of Kryvyi Rih, Dnipropetrovsk region Kuznetsova R. O. on interference in the activities of a judge in the administration of justice. In particular, the GRP decided to apply to the Office of the Prosecutor General for information on the detection and investigation of a crime in criminal proceedings, entered on August 12, 2021 in the Unified Register of Pre-trial Investigations under No. ____ on the grounds of criminal offense, reported by the judge of the Central City District Court of Kryvyi Rih, Dnipropetrovsk region Kuznetsov Roman Alexandrovich for the administration of justice: the decision of the High Council of Justice of 05.10.2021 No. 2060/0 / 15-21, »2021). On April 9, 2020, the GRP decided to give its consent to the detention of the judge of the Turkiv District Court of the Lviv Region Kryl L. M. under arrest (“On giving consent to the detention of a judge of the Turkiv District Court of the Lviv region Kryl L. M. under arrest: decision of the High Council of Justice of 09.04.2020 No. 911/0 / 15-20,” 2020). On June 14, 2018, the GRP decided to satisfy the request of the Deputy Prosecutor General – Head of the Specialized Anti-Corruption Prosecutor’s Office Kholodnytsky N. I. on extension of the term of temporary suspension of the judge of Kalanchak district court of Kherson region Zhyvtsova O. A. from the administration of justice in connection with criminal prosecution (“On satisfaction of the request of the Deputy Prosecutor General – Head of the Specialized Anti-Corruption Prosecutor’s Office Kholodnytsky N. I. in connection with criminal prosecution: the decision of the High Council of Justice of 14.06.2018 No. 1837/0 / 15-18, »2018).

M. S. Bulkat, based on the results of modern concept of the doctrine of the judiciary, indicates the complex nature of this concept, due to the unity of four aspects of its essence: linguistic, philosophical and legal, intersectoral, theoretical and legal. The first reflects the meaning of the terms “court”, “power”, “justice”, “impartiality”. The second combines justice as the basis of the judiciary and equality and legality as concepts that reflect the features of the national legal system that affect the content of justice in it. The cross-sectoral aspect takes into account the connection between the concept of the judiciary and political and social processes. The theoretical and legal aspect determines the specific nature of the concept of judicial power in relation to the category of state power. Theoretical and legal definition of the judiciary: relatively independent, legitimate and universal, legal component of state power; which has an imperative nature and control powers over other components of state power; provides regulation of public relations based on doctrinal provisions on the rule of law and three-element theory of state power in appropriate forms and methods based on its distinctive features. There are three groups of principles of the judiciary: general (interaction of the judiciary with other branches of government and society); organizational; functional. The first group includes: the independence of the judiciary, the exercise of certain entities, the availability of the judiciary, and so on. At the same time, the inviolability of a judge belongs to the third group of principles (Bulkat, 2019). These results correlate with current
developments in the organization of the judiciary, in particular in the context of the signs and principles of the judiciary (Yarova & Matveevsky, 2020).

The implementation of the general principles of the judiciary, on the one hand, depends on ensuring the immunity of the judge, and on the other – contributes to its strengthening. For example, a principle such as the independence of the judiciary could not be implemented without ensuring the impartiality of the judge in considering and deciding the case. On the other hand, the implementation of such principles of judicial independence as: accountability, lack of consent or approval during the decision (Telipko, 2011) and other principles help to create a sense of security in a judge and allow him to be truly impartial in decision-making.

The implementation of institutional guarantees of the immunity of a judge is a guarantee of ensuring the subjective right to a fair trial, the justice of the judiciary. In particular, the impartiality of a judge directly affects the implementation of such components of the right to a fair trial as: independence and impartiality, proper application of procedural law by the court and creating conditions for the exercise of procedural rights of litigants, adversarial and reasonable time and, ultimately, availability of the court. Without ensuring the impartiality of the judge, it is impossible to achieve justice in the natural and legal sense, both in the case and as a result of its consideration.

The immunity of a judge is also closely linked to the implementation of the principle of the exercise of judicial power by certain bodies (and the administration of justice exclusively by the court), as it expresses the additional immunity granted to a judge as a subject of justice.

The availability of the judiciary means, first of all, the availability of justice, which is the compliance of the organization and activities of the judiciary and the court, in particular, the public demand for legally significant cases, as well as meets current international standards. Access to justice includes: access to a court decision (proper motivation for the decision), procedural criteria (maximum simplification of the process in each case, minimum time for consideration of the case (Ovcharenko, 2020). On the other hand, the nature of judicial functions in the system of government bodies and the need to perform them as quickly and efficiently as possible are factors in the existence of a judge’s immunity as an element of his legal status.

Being given the purpose of law enforcement defined in the legal literature: implementation of substantive law in a particular case (Petrishin, 2020), we consider it impossible to properly impose law enforcement in the presence of personal interest of the law enforcer; because personal interests may prevail over law. This fully applies to judicial enforcement.

Institutional principles of the judiciary are in close cooperation with functional (e.g., the principle of the state language of justice, the principle of transparency and openness of the judiciary, etc.) and organizational (principle of unity of the judiciary and the status of judges, territoriality, specialization and instance of judicial system, etc.). (Organization of Judicial and Law Enforcement Bodies, 2013).

The inviolability of a judge is considered to be one of the basic concepts of administrative and legal support of the judiciary in Ukraine. A. A. Ivanyschuk emphasizes the problematic nature of the current state of ensuring a judge immunity, and also suggests considering it as a separate legal institution in the context of administrative and legal support of the
judiciary. Ensuring the inviolability of judges is a priority for the development of such areas of administrative and legal support of the judiciary as: the system of legal relations of public administration, which is formed between the subjects of judicial self-government and judges, citizens; problems of material security of judges immunity; principles of administrative and legal support of the judiciary; administrative and legal status of a judge as a representative of the judiciary; the right of judges to ensure immunity is a component of public subjective law in the field of ensuring the judiciary as the right of judges to require the public administration to take legal action aimed at creating appropriate conditions for the administration of justice; implementation of each specific legal relationship of public administration, which is formed between the subjects of judicial self-government and judges, citizens; issuance of bylaws and individual acts in this area, each of which should contribute to ensuring the immunity of judges; methods of administrative activity to ensure the functioning of the judiciary should help ensure the inviolability of judges, ensuring the inviolability of judges is a separate area of development of such methods (Ivanishchuk, 2017).

The scientific approach of A. A. Ivanishchuk is not contradicted by the position of other researchers on the issue of ensuring the judiciary, both previous and subsequent ones. For example, N. O. Chemodurova, studying the issue of administrative and legal principles of implementation of the principle of independence of judges in the field of administrative justice, points to its special place in the system of principles of law and characterizes it as constitutional, intersectoral, special legal, both organizational and functional. The inviolability of judges is determined by one of the guarantees of the principle of independence of judges (Chemodurova, 2016). A. V. Shevchenko, studying the issue of administrative and legal support of personnel work in the judiciary, an important historical stage of its development indicates the formation of safeguards of political influence on judges (Shevchenko, 2020). Similar approaches are demonstrated by other researchers in the field: S. M. Kichmarenko, A. L. Borko, T. V. Galaidenko and some others.

Correspond to the current provisions of administrative law on the subject and tasks of administrative law regulation conclusions A. A. Ivanishchuk on the purpose of administrative and legal support for the functioning of the judiciary: creating appropriate conditions for judges to ensure subjective rights, freedoms, legitimate interests (Ivanishchuk, 2017). Thus, institutional administrative and legal guarantees of a judge immunity become an integral part of the administrative and legal support for the functioning of the judiciary.

The legal literature expresses the scientific position that the administrative and legal support of the judiciary should be considered as a comprehensive institution of administrative law, given the specifics of: organizational legal relations in the organization of the judiciary compared to other types of administrative relations; the nature of organizational activities in the field of the judiciary – is exclusively by-law but neither legislative no judicial; has not only state-authoritative, but public-authoritarian character; has a single goal – to ensure the subjective right to court; has a specific component – the support activities of the State Judicial Administration of Ukraine (Ivanishchuk, 2017). A similar approach to the essence of the phenomenon of independence of the judiciary is defended by S. M. Kichmarenko, characterizing it as an intersectoral complex legal institution. At the same time, administrative and legal support for the independence of
the judiciary is considered an integral part of this institution (Kichmarenko, 2017). Such scientific approaches are promising, as finding out the institutional integrity of a legal phenomenon is an integral part of its study.

In the theory of law there is a well-established position on the allocation of the following features of the legal institution: a separate subject of regulation – homogeneous social relations; is an integral part of the field of law; integral nature of legal regulation; the presence of specific concepts, constructions, the subject composition of the participants in legal relations, etc. (Theory of State and Law, 2015). These features are complemented by industry doctrinal developments. In that way, R. S. Melnyk, researching the concept of the system of administrative law, rightly notes the conditionality of the content of the legal institution of the surrounding system, its consistency with its key factors. Otherwise, the theoretical construction of the institute will not be able to become the basis for effective legal regulation (Melnyk, 2010). The system of administrative law has a complex structure consisting of general and special parts. In particular, the general part includes such institutions as: administrative and legal regimes, administrative services, civil service, administrative coercion, administrative proceedings and some others. A special part of administrative law is devoted to administrative tort (Petkov, 2016).

The development of any legal entity is impossible without defining its structural elements and the links between them. The definition of each element implies the possibility of distinguishing it from other elements (Shinkaruk, 2002). Therefore, a necessary condition for the development of the institution of administrative and legal support of the judiciary is to determine its internal structure. Institutional administrative and legal guarantees of a judge inviolability are one of the elements of such structure.

Legal relations that arise in connection with the implementation of these guarantees have some signs of homogeneity. That is, all of them have the same object – to ensure the inviolability of the judge. The subjects of these relations are also quite clearly defined in Art. 126 of the Constitution of Ukraine of 28.06.1996 No. 254k / 96-VR (“Constitution of Ukraine: Law of Ukraine of 28.06.1996 No. 254k / 96-VR,” 1996) and Art. 49 of the Law “On the Judiciary and the Status of Judges”. At the same time, the content of these relations may differ significantly due to the variety of these guarantees.

The guarantees in question are undoubtedly an integral part of administrative law. However, in our opinion, the system of administrative and legal support of the judiciary is a direct tribal system for them, as the specifics of these guarantees are due to the specifics of the judiciary.

The integral nature of the institutional administrative and legal guarantees of a judge immunity is determined by their only focus – ensuring the impartiality of the judge in the administration of justice. All these guarantees are implemented through law enforcement. The only exception is the activities of public organizations as subjects of ensuring the immunity of a judge. However, in this case, too, only the activities of the authorized authorities are initiated.

Institutional administrative and legal guarantees of a judge immunity are characterized by special legal constructions and subjects of implementation: the need to obtain a specific sanction for detention, detention or arrest of a judge – permission; the specific subject
of granting such a sanction is the High Council of Justice (Part 1 of Article 49 of the Law “On the Judiciary and the Status of Judges”); immediate release of a judge who has been detained on suspicion of committing an act for which criminal or administrative liability is provided (Part 2 of Article 49 of the said Law); prohibition of the use of a pretext or compulsory delivery against a judge (Part 3 of Article 49 of the said Law) and others.

CONCLUSIONS

Regarding administrative and legal guarantees, the initial concepts are legal means, methods and conditions which, being applied, allow to ensure a certain state of public relations. Being in their “potential” state also has a protective effect, which can be described as preventive.

The following institutional administrative and legal guarantees of a judge immunity should be highlighted: impossibility of detaining or keeping in detention a judge without the consent of the High Council of Justice (paragraph 1, part 1, Article 49 of the Law of Ukraine “On Judiciary and Status of Judges”); impossibility to bring a judge to legal responsibility for the adopted decision (paragraph 2, part 1 of Article 49 of the said Law); the impossibility of using a pretext or forcible delivery to a judge, except for the pretext or bringing it to court (Part 3 of Article 49 of this Law); the presence of a special subject of notification of suspicion of committing a criminal offense – only the Prosecutor General of Ukraine or his deputy (Part 4 of Article 49 of this Law); establishment of exhaustive terms of removal of a judge from the administration of justice in connection with criminal prosecution (Part 5 of Article 49 of the said Law); establishment of a special subject of an application for obtaining a court permit to carry out operative-search or investigative actions against a judge – the Prosecutor General of Ukraine or his deputy, the head of the regional prosecutor’s office or his deputy (Part 9 of Article 49 of this Law); establishment of special rules of jurisdiction of consideration of cases concerning accusation, application of operative-search or investigative actions, precautionary measures against a judge (part 10 of Article 49 of the said Law); determination of a special subject of liability for damage caused by a court – the state (Part 11 of Article 49 of this Law).

The implementation of institutional guarantees of the immunity of a judge is a necessary condition for the proper implementation of all institutional principles of the judiciary. Regarding some principles, these guarantees are a direct factor in their implementation (including the principles of independence, impartiality, justice, rule of law).

Institutional administrative and legal guarantees of the immunity of a judge do not have the features of a legal institution in full, and therefore they cannot be characterized as a legal institution. However, they have a certain integrity and specificity, as well as a relationship. The legal relations arising in connection with the implementation of these guarantees are characterized by a certain homogeneity, in particular with regard to their object – ensuring the inviolability of a judge. Therefore, it is necessary to state the complex nature of these guarantees as a separate legal phenomenon.
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