

## DEFINITION OF THE CONCEPT OF LAW ENFORCEMENT: THEORETICAL AND LEGAL ASPECTS

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В статье исследованы современные научные подходы к пониманию понятия «судебное правоприменение». Раскрыта взаимосвязь судебного правоприменения с близким по содержанию явлениями. Отмечено, что судебное правоприменение следует рассматривать как форму применения права; как ведущую функцию органов судебной власти; как средство достижения правосудия. Сформулировано определение понятия «судебное правоприменение». Определена сущность, содержание и форму судебного правоприменения.

Ключевые слова: судебная власть, судебное правоприменение, правосудие, права и свободы человека и гражданина, демократическое государство.

У статті досліджено сучасні наукові підходи до розуміння поняття «судове правозастосування». Наголошено, що в юридичній доктрині у межах загальнотеоретичної науки проблематика поняття, сутності, змісту судового правозастосування, його співвідношення із взаємопов'язаними явищами була предметом розгляду, проте у зв'язку з трансформаційними суспільно-правовими процесами у нашій країні та прогалин і суперечностей у правовій доктрині ця тематика потребує комплексного теоретико-правового вивчення, враховуючи сучасні державно-правові реалії.

Підкреслено, що судове правозастосування є багатовекторним та складним явищем, яке виступає предметом системного обговорення як на практиці, так і в юридичній доктрині. Діяльність органів судової влади через застосування норм права (правозастосування) є одним із найефективніших засобів захисту прав і свобод людини і громадянина та інших суб'єктів правовідносин, а також контролю за діяльністю органів публічної влади.

Акцентовано, що у науці є розповсюджений підхід, що судове правозастосування – це особливий різновид правозастосування, проте й інші його різновиди є «особливими», «специфічними» тощо; кожен різновид правозастосування має як загальні, так і властиві лише йому ознаки, що зумовлює виникнення сумнівів з приводу використання низкою авторів термінів «особливий», «специфічний» під час формулювання визначення поняття судового правозастосування, адже їх можна застосувати і в інших випадках, в результаті чого відбувається змістовне перевантаження понять. Наголошено, що судове правозастосування слід розглядати як: форму застосування права; як провідну функцію органів судової влади; як засіб досягнення правосуддя. Сформульовано визначення поняття «судове правозастосування». Визначено сутність, зміст та форму судового правозастосування.

Ключові слова: судова влада, судове правозастосування, правосуддя, права і свободи людини і громадянина, демократична держава.

*The article investigates modern scientific approaches to understanding the concept of judicial enforcement. The relationship of judicial enforcement with related phenomena is revealed. It is emphasised that judicial enforcement should be considered as the form of application of law; as a leading function of judicial authorities; as a means of achieving justice. Definition of the concept of judicial enforcement is formulated. The essence, content and form of judicial enforcement are defined.*

*Key words: judicial power, judicial enforcement, justice, rights and freedoms of man and citizen, democratic state.*

The fundamental element of state legal development in Ukraine is the application of the norms of law (law enforcement), especially by the judiciary, since the latter acts as one of the most effective means of protecting human and civil rights and freedoms and control over the activities of public authorities.

The issue of judicial enforcement has been studied from different positions both in general theoretical and branch aspects. However, on the one hand, in the current conditions of judicial reform, the issue of judicial enforcement becomes even more important, since it directly influences the formation of the Ukrainian state. On the other hand, this issue is actualized in a new perspective, as in the period of active formation of the information society a significant increase and dissemination of information takes place in any field. Quite often, this information is either unsystematic or not relevant to the realities (not reliable for objective or subjective reasons), which complicates the development of different institutions and affects the intensity and quality of citizens' knowledge. All this is characteristic of legal science, in particular the theory of state and law. Therefore, nowadays jurisprudence is forced to solve a number of tasks that until recently seemed resolved, to seek effective methods for overcoming new problems. All this applies to judicial enforcement, which today plays an exclusive role for Ukrainian society.

Judicial enforcement is the basis of the legal life of the state and society, but its effective implementation requires a doctrinal basis. Issues of law enforcement and judicial enforcement, in particular, were studied by such authors as M. Aleksandrov, S. Aliksieiev, V. Babaev, M. Baitin, S. Bobotov, E. Bobreshov, O. Bonner, M. Borysenko, Y. Bro, M. Vikut, M. Voplenko, M. Gnatiuk, V. Gorsheniev, P. Guivan, M. Gurvich, I. Diuriagina, V. Yershov, S. Zagainov, O. Zaichuk, S. Zapara, V. Laz-

ariiev, J. Kalmykov, V. Kartashev, S. Kozhevnikova, V. Kopeichykov, M. Marchenko, A. Mytskevych, K. Mursalimova, L. Nalyvaiko, I. Nevzorov, A. Nemirovskaya, P. Nedbailo, N. Onishchenko, I. Pogribnyi, P. Rabinovich, V. Radchenko, M. Risnyi, O. Skakun, A. Sultanov, V. Tatsii, Yu. Tykhomyrov, M. Tolochka, A. Cherdantsev, S. Shevchuk, V. Yushupov and others. A number of aspects of the topic now require a new understanding, including terminological clarification and substantive content of judicial enforcement.

In any science, one of the most complex processes is the definition of initial provisions and the concept of the phenomenon under study [1, p. 15]. In the legal doctrine within the framework of the general theoretical science, the problem of the concept, essence, content of judicial enforcement, its relationship with the interrelated phenomena was the subject of consideration, but in connection with the transformational social and legal processes in our country and the gaps and contradictions in the legal doctrine, this topic needs a comprehensive theoretical and legal study, taking into account modern state legal realities.

At present, large-scale discussions around the issues of organization and activity of judicial institutions and ways of their further development have been launched and they are widely discussed not only in the scientific sphere, but also in the society and the country's political elite. It is believed that the creation of a judiciary in Ukraine that meets international standards has many problems that require solving a number of issues related to legislative, organizational, financial, socio-psychological, informational, personnel, material and technical design of the entire complex of measures designed to create an effective and consistent with the norms of international law, judicial system of our state [2, p. 93]. This formulation of the problem involves solving a number of tasks, including retrospective analysis and terminological refine-

ment of certain concepts, in particular, of judicial power.

It should be noted that the category of judicial power is relatively new in the national doctrine. A. Georgitsa stressed that the judiciary – in accordance with the theory of the distribution of power – is an independent sphere of public power (along with legislative and executive), which is: a) a set of powers for the administration of justice; b) the system of state bodies that exercise these powers [3, p. 375]. According to this approach, the judicial branch of government is a generalized phenomenon, and judicial authorities are subjects of its implementation, endowed with the appropriate powers for the administration of justice.

I. Turkina emphasises that judicial power is an independent branch of state power, created for the administration of justice and the implementation of other functions by constitutionally established bodies – courts, that have full jurisdiction, exercising power on the basis of the current legislation, observing the established procedural forms [4, p. 42]. S. Zapara applies a close approach to the above and believes that the judiciary is mediated not only through justice (corresponding processes), but also through the judicial power relations, which arise and operate within the framework of the activity of the jurisdictional bodies, and is the basis for judicial cooperation between the judiciary and justice in general [5, p. 72-82]. Thus, the author distinguishes between the two main forms of expression of the judiciary: justice and judicial power relations. In addition, the author delineates such phenomena as judicature and justice, where the latter is a wider phenomenon.

By conducting a study on the issue of judicial enforcement, S. Melnychuk emphasises that, on the one hand, judicial power is a manifestation of power characterized by general features and attributes of power, and on the other hand, it is the most rational and effective form of control over state power. However, in defining the relationship between the notion of judicial enforcement and the related concepts of judicial power and judicial activity, it should be understood that judicial enforcement is a form of manifestation, the exercise of judicial power that correlates with judicial enforcement as a whole and as a part. Judicial activity is a form of manifestation, the realization of

judicial power. Within the framework of judicial proceedings, judicial activity is carried out in the form of justice, judicial control and judicial authorization, which in turn can be considered as a direction of activity of the judiciary [6, p. 45]. We believe that such a conclusion is of great scientific significance, but needs some clarification, in particular, with regard to the phenomenon of judicial activity, which the author refers to, but does not specify and presents it in a rather blurry and indirect way.

In the scientific literature, authors also refer to such a term as judicial activity. Thus, V. Novitskyi considers that the peculiarity of judicial activity is that in the context of resolving a litigation the judiciary applies the legal norm to specific social and legal relations, whereas judicial enforcement is the exercise of the activities of the court and other participants in the judicial process, established by law, in compliance with the requirements of the law, the use of subjective rights, the performance of duties during the consideration and resolution of lawsuits [7, p. 230, 232]. Focusing on the use of subjective rights, the performance of duties during the consideration and resolution of lawsuits, the author applies an unconventional approach to understanding of judicial enforcement, since it also includes other non-state actors, and in turn, he meaningfully considers judicial activity as judicial legal thinking in a relatively well-established approach among scholars.

D. Shadrin proposes to consider judicial activity in a broad and narrow sense. The researcher identifies organizational judicial activity, which is, in particular, connected with the coordination of work both within the judicial system and the judiciary with other branches, generalization of judicial practice, training of personnel, etc. Judicial activity in the broad sense is considered as a set of procedural and security and administrative, as well as other activities which are indirectly subordinate to justice [8, p. 301]. We believe that the author proposed a completely rational approach to understanding the phenomenon of judicial activity.

In turn, M. Gorban stressed that there is no doubt that judicial activity is a form of enforcement, the main purpose of which is the administration of justice. Judicial activity is the legal ap-

plication of a professional judge, which is aimed at the administration of justice by considering and resolving a case on the merits, the individualization of a legal provision concerning the participants in the trial. The author attributes to the signs of judicial activity: its subject is a professional judge; it is aimed at the administration of justice; it is carried out in a special procedural form and in accordance with established judicial procedures; it is carried out by reviewing and resolving the case on the merits; is aimed at creating an individual order with the achievement of maximum legal certainty regarding the participants in the trial; its result is objectified in the court decision (law of application of law) [9, p. 17, 21]. Thus, the author firstly actually identifies judicial activity and judicial enforcement, defining that judicial activity is a form of enforcement, and in this case there is a substitution of concepts, and secondly, it distinguishes between justice and judicial enforcement, understanding the latter as a wider, than justice, phenomenon.

Consequently, the consideration of doctrinal sources gives grounds to note that one of the forms of enforcement is justice (as a rule, organizational and administrative (operational-executive), law enforcement, etc. forms are distinguished). However, other scholars conclude that judicial enforcement (judicial form of judicature) and justice are identical phenomena. It is appropriate to turn to author research on the understanding of justice.

O. Leist stressed that justice is an impartial and just settlement of disputes [10, p. 81]. Justice is inherently recognized as such only if it meets the requirements of fairness and ensures an effective renewal of rights, noted in the decision of the Constitutional Court of Ukraine [11]. That is, justice in its essence implies fair consideration of a case and a decision. Justice, first of all, is an ideal, the achievement of which makes it possible to talk about the state as democratic and legal. In this context, it is important to note that the notion of judicature and justice should not be equated, since not every judicature can be considered fair and impartial.

If to turn to the legal encyclopedia, we can conclude that justice and judicial enforcement are identical phenomena. Thus, justice is defined as the law enforcement activity of the court for review and resolution in the procedure established

by law, the procedure of civil, economic, criminal and administrative affairs under its competence, in order to protect the rights and freedoms of man and citizen, the interests of legal entities and the state [12, p. 50-51].

The justice is also proposed to understand as the way of resolving the dispute about the right which the rights and freedoms of subjects (individuals, legal entities, state, society) of law are protected by: a) on the basis of the law and principles of justice, equality, liberty and humanism; b) on a permanent and professional basis by special state bodies, courts, whose acts are provided by the authority of the state [13, p. 244].

Thus, the legal doctrine expresses a number of scientific positions regarding the understanding of the category of justice: it is the way of resolving the dispute over the law; external expression of the judiciary; means of realization of judicial power; function of the judiciary; form of judicial power, etc. In addition, the authors often make the identification of justice with such concepts as judicial power, judicial proceedings, judicial enforcement. This, in turn, makes reference to the definitions proposed by the researchers as judicial enforcement, which is the main subject of the study.

In particular, Yu. Tykhomyrov considers judicial enforcement as a process of practical implementation of the law with the help of various means and methods for regulating the behaviour of legal entities and individuals [14, p. 61]. We consider this position to be quite acceptable, however, in this case, the author chose a limited approach to subjects whose behaviour should be regulated through judicial enforcement, since beyond the proposed definition there were public authorities, public organizations, etc. In addition, the scientist did not make any precision what exactly should implement "the process of practical implementation of the law".

In turn, O. Volkov specifies the subject of judicial enforcement and proposes to understand under this phenomenon the lawful activity of courts as competent state authorities, independently called to administer justice in a state governed by law, which is associated with the organization of the implementation of the requirements of dispositions and sanctions of legal norms (regulatory and security norms of law) in legal relationships

[15, p. 9-14]. It is important to emphasise that the scholar distinguishes between judicial enforcement and justice, which is an important aspect of our study.

E. Bobreshov believes that judicial enforcement is a special type of enforcement, which consists in the administration of justice, carried out by the national system of courts for the purpose of considering, resolving and regulating any social conflicts that fall within their competence, in the procedural order and form established by law [16, p. 5]. The author delineates judicial enforcement and justice, and considers the latter as the essence, meaning of judicial enforcement, which is difficult to disagree with. The researcher also points out that judicial enforcement is a special type of enforcement, but there is every reason to assert that its other varieties are "special" or, as other authors point out, "specific", since each type of enforcement has both general and peculiar characteristics.

R. Gaibov reflects a similar type of correlation in his definition of judicial enforcement. A specific type of enforcement, the meaning of which is justice, is carried out by a court in order to resolve relevant cases in the procedural forms established by the law and in accordance with established principles and values [17, p. 6]; O. Averin defines judicial enforcement as a specific form of realization of the right by a competent authority – a court, carried out in a certain manner established by law, aimed at the implementation of legal requirements, the direct result of which is to resolve the legal conflict by issuing an act of judicial enforcement in a particular legal case [18, p. 28-29] and others.

M. Borysenko, S. Melnychuk and others consider it expedient to use the term "judicial form of law enforcement activity". Under this phenomenon S. Melnychuk understands the normative definite course of the law-enforcement activity, which covers the implementation of the functions of the state through the administration of justice – the consideration of cases on the merits and the adoption of a decision in the statutory procedural form of all parts of the judicial system of the state – with a view to resolving legal conflicts [6, p. 45]. The scientist defines justice as a way of fulfilling the functions of the state through the implementation of judicial enforcement.

The general theoretical analysis of the issues of the essence of judicial enforcement and its relationship with meaningfully similar concepts gives grounds to state the following.

1. Judicial enforcement is a multi-vector and complex phenomenon, which is the subject of systematic discussion both in practice and in legal doctrine. The activity of the judicial authorities through the application of the rules of law (enforcement) is one of the most effective means of protecting the rights and freedoms of man and citizen and other subjects of legal relations, as well as control over the activities of public authorities. In science, the widespread approach is that judicial enforcement is a special type of enforcement, but its other varieties are "special", "specific", etc.; each type of enforcement has both general and peculiar features, which causes doubt about the use of the terms "special", "specific" by a number of authors when formulating the definition of judicial enforcement, since they can be applied in other cases, as a result of which the meaningful overload of concepts takes place.

2. Judicial enforcement should be considered as the form of application of law; as a leading function of the judicial authorities; as a means of achieving justice. Judicial enforcement (judicial form of law enforcement activity) is a legitimate and creative activity (internal (decision-making process) and external (special style of business, etc.) of the judiciary, aimed at protecting the rights, freedoms and legal interests of legal entities in accordance with the organizational and procedural requirements established by the current legislation. In the case of the existence of a creative component in the application of the rules of law by the judiciary, within the framework of the current legislation, their functions acquire a democratic content, since in the cases of technical application of the law, the levelling of the principles of justice, humanism, which form the basis of law enforcement, is possible.

3. The essence of judicial enforcement is the administration of justice. According to the content, judicial enforcement is a kind of legal activity of the state and has the relevant features: multiplicity, temporal and spatial properties (restrictions), official and public character, etc. In accordance with the current legislation, judicial enforcement is car-

ried out in certain procedural and organizational forms: 1) by local, appellate courts, by the Supreme Court (the system of judicial administration); and 2) the Constitutional Court of Ukraine (the body of constitutional jurisdiction). Under the relevant specialization, the courts, which are part of the judicial system, carry out civil, criminal, economic, administrative proceedings, and also deal with cases of administrative offences. Specialist judges may also be introduced to deal with specific categories of cases.

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