

The structure of the legal system

Dmytro Lukianov

Associate Professor, Doctor of Law (PhD),

Head of the department for planning and coordination

of legal studies of the National Academy of Law Sciences of Ukraine

Ukraine

Problem's setting

The interest of legal science to the issues related to discovering regulatory information, development and functioning of the legal systems is still relevant despite the impressive number of studies in this field of legal knowledge. It is largely due to the dynamism of the legal system itself, their variety and extraordinary wide range of approaches in understanding this category. However it is difficult to stay away the discussions about the concept of the legal system, its features and elements, because the "law to human society spiritually is almost the same as the air for a man – physically. As someone, who has achieved a higher degree of consciousness tends to become acquainted with the surrounding environment, the properties and conditions of the atmosphere, where a human being lives, so as the society can not watch the indifference to such phenomena and living conditions as law"¹.

¹ Kashnitsy I. On the essence of the law. Research / I. Kashnitsy. – Warsaw: Publishing House of the Medical newspaper, 1872. – P. 1.

Therefore, the most fundamental issues of legal theory are represented in the way what is the legal system?².

Objective of the article is to establish the structure of the legal system on the basis of the conducted analysis of the approaches presented in the works on generally theoretical legal sciences of its determining and identification of the main factors of influence on its formation and development.

The state of the research

An important contribution to the development of general theory of systems and the use of systematic method in legal science were made both by domestic and foreign scholars, among them we should mention scientific research of V. Afanasiev, E. Yudin, V. Lektorskyi, V. Shtyrov, N. Motroshylova, V. Sadovskiy, L. Tiunova, A. Bobylov, D. Kerimov and others. The works of such scholars as: S. Aleksieiev, V. Babkin, Zh.-L.

² Summers Robert S. Form and Function in a Legal System: A General Study / Robert S. Summers. – New York: Cambridge University Press, 2006. – P. 3.

Berzhel, R. David, V. Zhuravskiy, A. Zaichuk, A. Zaiets, Zh. Karbonie, M. Koziubra, A. Kolodii, V. Kopeichykov, O. Kopylenko, Kh. Kotts, R. Lezhe, L. Luts, M. Marchenko, N. Onishchenko, V. Opryshko, V. Pohorilko, S. Polenina, P. Rabinovych, A. Saidov, V. Selivanov, Yu. Tykhomyrov, Yu. Shemshuchenko, K. Tsvaiert and others have also the interest for the purpose of studying the category of the “legal system”. Particular attention should be paid to the fundamental five-volume edition on the problems of the legal system under the general edition of M.V. Tsvik and O.V. Petryshyn³.

The main part

There is a thought in legal literature according to which the algorithm of penetration to the essence of the system must begin with the identification of its elements⁴. This approach is laid, in particular, as the basis of R. Summers work “Formation and functioning of the legal system”. The scholar indicates that a lot of the leading law schools, researchers and theorists of law, including H.

Hart⁵ and H. Kelzen⁶, considered the legal system in the XX century only as a system of rules of conduct. However, the legal systems of developed societies are much more than just a system of rules. They consist of various functional blocks, and only one of them is a system of rules of conduct. These various blocks, in turn, are properly organized, allowing them to form a single system. To understand the nature of the legal system, first of all, it is necessary to understand which functional elements compose it. They include relevant institutions such as legislative bodies and courts, legal provisions such as rules and principles, non-normative elements of law such as contracts and agreements, interpretations and other legal methodology, sanctions and means of legal protection, etc.⁷.

However, using this approach which is based primarily on the identification of the constituent elements of the legal system, scientific works, that attempt to provide a generalized characteristics to the national legal systems⁸, is generally limited with common characteristics of the national system

³ Ukraine’s legal system: history, state and perspectives: in 5 vols. – Kh.: Pravo, 2008. – Vol. 1: Methodological, historical and theoretical problems of formation and development of the legal system of Ukraine / under the edition of M.V. Tsvik, O.V. Petryshyn. – Kh.: Pravo, 2008. – 728 p.

⁴ Dedov D.I. System factors / D.I. Dedov. – M.: Internet-publishing house Startup, 2013. – P. 8.

⁵ Hart H. L. A. The Concept of Law / H. L. A. Hart. – Oxford: Clarendon Press, 1994. – 315 p.

⁶ Kelsen H. Introduction to the Problems of Legal Theory: A Translation of the First Edition of the *Reine Rechtslehre* or *Pure Theory of Law* / B. Paulson and S. Paulson trans. / H. Kelsen. – Oxford: Clarendon Press, 1997. – 216 p.

⁷ Summers Robert S. Form and Function in a Legal System: A General Study / Robert S. Summers. – New York: Cambridge University Press, 2006. – P. 9.

⁸ The legal systems of the world countries: An Encyclopedic Reference (Exec. Ed. Doctor of Juridical Sciences, prof. A.Ya. Sukharev). – M.: NORMA, 2003. – 976 p.

of law, as well as the disclosure of the judicial system of the state. If the subject of the research is comparative and legal aspect then it is often focused on the comparison of the sources of law⁹.

As it is perceived, when we talk about social systems, which also include the legal system, the consideration of the issue should begin with the analysis of the factors affecting its formation and determine its specificity. Identification of these factors will make it possible to put them in brackets, leaving within the legal system's formula only those elements that constitute it, regardless of the context, where it is formed and operates. For example, features of Western and Eastern ways of development of legal systems depends largely on what kind of sources obligations underlying in the basis of sociocultural reality, including the legal one. In case, where the sources of obligations are external factors (the principle of legality) as it is in the Western system of law, there is a need of clear justification of the legal rights and obligations of an individual through the law, which necessitates a necessity in more developed legal system. But if the source of obligations is inside (the principle of harmony) as it is in Eastern civilization, an important task is no justification of laws, but

⁹ The main legal systems of the present / Manual in theory of state and law. Under the Ed. Of Dusaiev R. N. – Petrozavodsk: Publishing House of Petrozavodsk State University, 1996. – 28 p.

disclosure of the obligation's essence and comprehension of its hidden roots¹⁰.

We have to agree with the fact that “every political system, each country creates its special law according to the characteristics, level of development, to the philosophy, ideology, beliefs and aspirations. Law of every society is unique, it is the expression of a special conception of social order, which has set for itself a specific society, and demonstrates the role that society assigns for law. Law, therefore, is a reflection of the society. Depending on a particular political system on the country or even the era of development the legal systems differ in their basic principles, concepts and legal categories, by their structure, application and purpose of the norms”¹¹. And “law of the East as different from ours as the Western landscape from the European one, as the style of Alhambra from the Renaissance style”¹².

However, despite the diversity of legal phenomena at the national, sub-national and supranational levels, the concept of the legal

¹⁰ Grytsenko H.D. Law as a sociocultural phenomenon (philosophical and anthropological concept) / Synopsis of a Thesis for a Doctor of Philosophy. Speciality: 09.00.13 – Religious studies, philosophical anthropology, philosophy of culture (jurisprudence). – Stavropol, 2003. – P. 224.

¹¹ Sandevuar P. The structure of the legal system: Public Law and Private Law = Les divisions du droit droit public, droit prive / Embassy of France in Moscow. Ministry of Foreign Affairs. Interdepartmental Commission for Central and Eastern Europe Countries. – M.: The French Technical Cooperation Organization, 1994. – P. 11.

¹² Koler I. Law as an element of culture / prof. I. Koler; translation of A.Ye. Vorms. – Moscow: Grosman and Knebel (I. Knebel), 1896. – P. 8.

system is the category, which allows to form a holistic view of the legal reality¹³ and to develop criteria for comparing elements that constitute it. Moreover, despite the fact that “law of different countries is formulated in different languages, using different techniques and is created for the society with very different structures, customs and beliefs”¹⁴, however, it is constantly moving closer and integrated¹⁵.

To solve these tasks the comparative law implemented the term “legal system” into the legal language by using it in several meanings. In the narrow sense the legal system is law of a particular society and related to it legal phenomena. In this sense the term “legal system” is used, in particular, in the word combination “legal system of the society” or “national legal system”. The legal system in a broad sense is a certain set of different legal systems, united by common characteristics. The term “legal system” in the broad sense is identical to the term “legal family”. Besides, one can find the usage of

the term “legal system” as a notion denoting a particular historical type of law¹⁶.

The emergence and role of the category “legal system” related to the development of scientific understanding about law and a change in legal awareness. There is a need to move from relatively isolated and differentiated study of individual aspects of legal reality (law, justice, lawmaking, legal relations, law realization, etc.) that is characteristic for the previous stage of development of the theory of law, to the complex understanding of legal reality, its foundations and structures. The need to overcome the traditional normative understanding of law demanded the implementation of such a category to the conceptual apparatus that would allow to cover the full range of legal phenomena, their interaction and system relations, to display a higher level of generalization of reality than a system of norms and the system of legislation. That category was the legal system”¹⁷.

The next step in the study of state and legal reality was not just its perception as an integrated system, but at the same time as an element of the social and cultural system that would feel the impact of its other elements, developed in close connection with them. So,

¹³ Ford S. *The American Legal System. Its Dynamics and Limits* / S. Ford. – St. Paul, 1984. – P. 1.

¹⁴ David R. *Major legal systems of modernity* / R. David, K. Joffre-Spinosi. Translation from French V.A. Tumanov. – M.: International attitude, 1999. – P. 18.

¹⁵ Tretiakova O.D. *Legal convergence* / O.D. Tretiakova // Synopsis of a Thesis for a Doctor of Juridical Sciences. Speciality 12.00.01 – theory and history of law and state; history of doctrines about the law and the state. – Vladymyr: Vladymyr Law Institute of Russian Federal Penitentiary Service, 2012. – P. 20.

¹⁶ Thiele A. *Socialist comparative law* / A.A. Thiele. – M.: Legal literature, 1975. – P. 90; Tykhomyrov Yu. A. *The course of comparative law* / Yu. A. Tykhomyrov. – M.: NORMA, 1996. – P. 42.

¹⁷ Rotaru A. V. *Mechanism of convergence of national legal systems* / A.V. Rotaru // Journal of Kyiv University of Law. – 2011. – № 2. – P. 75.

historically the legal system and law are constituted, in particular, they act as social and cultural phenomena and are the most important factors, when their content is considered (or should be considered) in the law-making and law enforcement processes. Thus, the scholar of Jewish law Z. Folk noted that it would be “tragic ... for the people ... if the state... abandoned its original law. The future... of the state depends mostly on the ability to preserve its cultural identity”¹⁸.

Considering the factors that affect the formation and development of law, it is clear that this “should be such systemic factors that guarantee the existence of life itself for already several billion of years. And law is a reflection of these systemic factors, the rules set out in the minds of people, their mind, which is caused by the same systemic factors”¹⁹.

However, despite the variety of factors that influence the formation and development of legal systems, there is general regularity that equally affects any system formations. In particular, each system is a set of interrelated elements and meets the following criteria:

- divisibility into individual components of the system, its elements (an element is a simple part of the system, but it can also consist of individual components, in

this case the element gets the character of subsystem);

- stability (composition of elements and content of relations between them are characterized by constancy);

- existence of processes of interaction between elements inside the system; interaction is due to the relationship (but not interdependence) of the system’s elements.

Since the system is in a state of constant change, it should seek to preserve its identity concerning the environment. Such processes aimed at preserving the systems scholars call morphogenesis²⁰. A manifestation of the latter is the system’s ability to adapt to the environment, updating its functions, maintaining a certain status, establishing optimum between stability and dynamism of the system. The legal system exists along with other systems, different in content, essence, nature of links between the elements, degree of integration of the elements and structures.

Law is a part of the culture, one of its sides, one of its “points” that contains “samples that help to decide what exists and what could be, exist (the relationship); how to relate to what is and what could be (values); what to do and how to do it (norms)”, as well as what sanctions that promote respect for these samples. As we can see, it is about such

¹⁸ Folk Z. *Jewish Law // An Introduction to legal systems.* / Edited by J. Duncan M. Derrett. – New York : Praeger, 1968. – P. 52.

¹⁹ Dedov D.I. *System factors / D.I. Dedov.* – M. : Internet-publishing house Startup, 2013. – P. 12.

²⁰ Shadrakov V.B. *The problem of systemogenesis of professional activity / V. B. Shadrakov.* – M. : Nauka, 1984. – P. 48.

elements of the legal system as law norms, legal ideas as a part of cultural values and legal relations as a kind of social and cultural relations. In fact, it is the approach that is laid as the basis for the legal system's determining as a system of legal ideas, law norms and legal relations that are formed as a result of their implementation²¹.

Similar to the stated above is the approach of L. Friedman, who distinguishes three levels of the legal system: the structure or skeleton, where as the basic and constant component he considers the principles of the legal system's organization, certain constants that are living long period of the parts, which were always present in the system (even in the past century) and will be the same over a long time, they provide the form and certainty to the whole; internal basis of the legal system, where existing rules, norms and behavior patterns within the system make its essence. This are, first of all current regulations and the actual legal activity and its outcome; the third level of the legal system is hidden from superficial view, it is reflected in the quantitative and qualitative characteristics – in the legal culture as a barometer of public life, which is at the same time a social force that determines how often a particular law is

used in practice, how it is avoided or abused.²²

These approaches are unanimous in singling out in the structure of the legal system of ideological, normative (regulatory) and functional elements. It is appropriate to add them with the elements that point to institutional and communicative components of the legal system. This allows us to distinguish the following subsystems of the legal system of the society: (1) institutional subsystem – subjective composition (law subjects) as such, which creates a system, factor of the whole legal system; (2) normative (regulatory) – legal norms and principles regulating relations between law subjects that are objected and systematized in legal acts; (3) ideological – legal awareness of every person, his sense of justice and legal culture, the ability to evaluate legal existence and choose the way of behaviour – lawful and unlawful; (4) functional – lawmaking, realization of law, law enforcement, legal education, legal relations, legal practice. The effect of the law is formed, changed, realized through them; (5) communicative – integrative (summerized) relations of all subsystems of functioning of legal system of the society in the whole that determine the effectiveness of legal regulation, legality and the rule of law.

²¹ Grytsenko H. D. Law as a sociocultural phenomenon (philosophical and anthropological concept) / Synopsis of a Thesis for a Doctor of Philosophy. Speciality: 09.00.13 – Religious studies, philosophical anthropology, philosophy of culture (jurisprudence). – Stavropol, 2003. – P. 201.

²² Friedman L. Introduction to American Law / L. Friedman. – M.: Progress, 1992. – P. 34.

Besides, one can also offer the analysis of the structure of the legal system in static and dynamic aspects: in static it acts as a set of legal norms, principles and institutions (normative party of the system), a set of legal institutions (organizational element) and a set of legal beliefs, ideas, concepts, peculiar to this society (ideological element); in dynamics the legal system is viewed in terms of the processes that provide its mobility, characterize its aiming and efficiency, the components of which serve law-making, realization of law including emergence, change and termination of legal relations; legal thinking.

Thus, we can **conclude** that the main element of the legal system is law, but it is not the only structural component. Scholars refer legislation, legal institutions, legal practices, realization of law and law-making, rights, freedoms and duties of citizens, legal relations, legal awareness, legal culture, law and order, etc. to its structure. All elements of the legal system can be grouped into several subsystems that make up its structure – institutional, regulatory, ideological, functional and communicative components of the legal system. The content filling of these elements is unique to each legal system because of the fact that the legal system interacts with other elements of social and cultural system of the society, where it is formed, developed and operates.