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**Modern Approaches to the Interpretation of the Rule of Law Principle: Ukrainian and European Experience**

The principle of the Rule of Law has been still causing many discussions in Ukraine. Because Ukraine belongs to the Continental law traditions, where the doctrine of the state of law (or state based justice and integrity) prevails. It thus emphasizes the importance of a certain structural and functional construction of the state. Instead, the doctrine of the rule of law is borrowed from the Anglo-American legal tradition and first of all, it defines the quality requirements for law making and law implementation.

In terms of constitutionalism, the doctrine of the Rule of Law permeates the entire constitutional structure of the state. However, it does not mean that Constitution is inherent in each state. The constitution is not reduced only to a certain written legal act. At the same time, it can be emphasized that it has the supremacy, the highest legal force regarding international treaties, laws and other legal acts, a special procedure for adoption.

According to the standard of understanding of the rule of law, the constitution means a certain kind of joint activity in society regarding the formulation, reproduction and additions of rules and procedures. At the core of such rules, there are fundamental values of human dignity, freedom, equality and democracy, which permeate the relations between the state and a private individual, establishing a limited government. The basis of it is respect for the private autonomy of the individual, who has the freedom of the will concerning a responsible choice of behavior without external pressure and oppression.

In the light of this characteristic, below I will describe the modern approaches to interpreting the principle of the Rule of Law in European and Ukrainian legal traditions. I will also present you some examples that show the impact of social interaction structures on this process and the formation of an agreement regarding the content of common legal values.

**General Characteristic the Rule of Law Doctrine**

According to the Venice Commission criteria of the rule of law equally distributed to individual human rights. They are affected not only by the authorities of the State, but also by hybrid (State-private) actors and private entities which perform tasks that were formerly the domain of State authorities, or include unilateral decisions affecting a great number of people, as well as by international and supranational organizations. Such approaches reflect the current trends in understanding this principle, which is based on a combination of a natural-legal and positivist approach in interpretation of human rights. In essence, it is a recognition of the fact of multilevel public authority and its net, where the mechanism of decision-making is interwoven by private mechanisms for the rule recognition and rule implementation [1]. Thus, it is admitted that a contract and an arbitration, which are fundamental in private law, are the instruments of the formalization of mutual rights and obligations at the level of public law. Further, the leading role of the rule of law in the consolidation of legal values is defined, according to which it can only flourish in a country whose inhabitants feel collectively responsible for the implementation of the concept, making it an integral part of their own legal, political and social culture.

According to Albert Venn Dicey, the rule of law is characterized by at least three elements: the absence of an arbitrary government; subordination of everyone to common law, which is applied by the courts of common law; the result of the common law is the norms of constitutional law. [2, p. 205-233]. According to Turpin and Tompkins: `The sovereignty of Parliament concerns the relationship of Parliament to the law; the rule of law concerns that of the government to the law` [3, p. 76]. Like Dicey, T.R.S. Allan connects the principle of the rule of law with the sovereignty of parliament and determines that such connection imposes certain requirements concerning an application of the law in judicial practice [4, p. 246,256].

At the same time, there are formal and material aspects of the rule of law. According to Brian Tamanaha, formal concepts focus on proper sources and the form of legality, and material concepts include besides this the requirements to the quality of the law. As a rule, profound theories of the rule of law are based on an idea of inalienability and integrality of human rights and freedom, which constitutional consolidation means their recognition by the state, since they are based on the equality of each person. In example, Lord Kamden in 1765 has stressed that: `By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing` [3]. The principle affirmed in case *Entick v Carrington*, that a public officer must show express legal authority for any interference with the person or property of the citizen, is still the law. On the other hand, Tamanaha points to the danger of excessive activation of the courts by checking laws for the purpose of human rights protection, since under such conditions there may be interference in the sphere of legislation [5, p.107,126-127].

In accordance with the case law of ECHR, the principle of the Rule of Law includes the following regulations: a) protection against arbitrariness; b) observance of an access requirement for the court; c) legal certainty; d) non-interference of a legislature in justice; e) necessity for court decisions. According to the report of the Venice Commission, the principle of the Rule of Law consists: legality (supremacy of the law), legal certainty, prohibition of arbitrariness, respect of human rights and freedoms, access to justice before independent and impartial courts, equality and debarment of discrimination. Currently in Ukraine, discussions about changing the traditional concept of the rule of law «верховенство права» to name «правовладдя» (power of law) or even «мірило правовладдя» (the rule of law checklist) are underway.

**Constitutional Jurisprudence of Ukraine**

The Constitutional Court defines the rule of law as the rule of law in society, which requires from the state its implementation into law making and law enforcement activities (decision of the CCU No. 15-rp / 2004). However, such understanding of the rule of law is too abstract, since it does not determine its essence. In essence, the Constitutional Court develops the doctrine of the rule of law in directions which determine: a) admissible interference of the state in a private life of the individual; b) legality in implementation of power authority; c) requirements to the quality of legislation; d) ensuring the unity of the legal system, based on the supremacy of the Constitution of Ukraine.

The decision of the Constitutional Court of Ukraine concerning the guarantees of appealing against a decision in the administrative court (decision of the CCU
No. 3-rp/2015) is quite noticeable, since the practice of the European Court of Human Rights on these issues is shown in detail there. This case demonstrates different approaches to ensuring the right to appeal judicial decisions in the law of Ukraine and the law of the European Convention on Human Rights. General regulation of the right to appeal court decisions had been changed before the amendments to the Constitution of Ukraine by Law from 2016, 2 June in part on justice were adopted. Previously, there was a provision on the universality of the right for appeal and cassation appeals, except the cases specified in the law. After making changes to the Constitution, an appeal is guaranteed, and the cassation - in cases stipulated by law. Such approach is based on the criterion of the significance of the case for the legal system or the material damage related to human rights and freedoms. In this regard, the Court has noted that “the right to judicial protection includes, in particular, the possibility of appealing court decisions in appeal and cassation procedures, which is one of the constitutional guarantees of the implementation of other rights and freedoms, their protection from violations and illegal encroachments”.

In the same case, there was a question regarding the using of Engel's criteria for trial about administrative offences, which concern such measures of influence as administrative arrest and significant administrative penalty. These measures of influence in the ECHR case law are considered as criminal, their use is possible with the observance of all necessary guarantees during the criminal process (presumption of innocence, the right to legal assistance, the right to be heard before the court, etc.). In this regard, Ukraine has some problems related to the legal process, since some of these guarantees do not act properly during the trial of administrative cases.

Justice is a criterion for understanding the admissible limits of state intervention in private life, which determines the criteria for the legal content of public authorities’ activities. Justice is interpreted by the CCU as the humanitarian dimension of law (respect for human dignity), ensuring the principle of equality and justification for differentiation, equal application of laws and non-discrimination.

**The Rule of Law Doctrine and Legal Certainty**

Legal certainty is the rule of law core, the legal acts should be predictable, in order a person could plan his/her activities for future, based on his/her own understanding of their provisions or based on advice from a lawyer. In terms of the interaction of legal systems, the impact of practice of the European Court of Human Rights and the EU Court of Justice affects the Constitutional Court of Ukraine and Supreme Court's argumentation of their decisions. There is horizontal interaction in the rules and procedures formulation. A key criterion for legal certainty is predictability of the written law, which defines the rules related to restrictions on individual liberty and property of a person. Proceeding from general standards of due process, the Constitutional Court of Ukraine emphasized that the constitutional guarantees of freedom and personal integrity prescribe "mandatory requirements for lawful arrest or being in custody: firstly, arrest or being in custody should be carried out solely on the basis of a duly motivated court decision; secondly, the grounds and procedure for the application of these precautionary measures should be defined in the law and should be consistent with the constitutional guarantees of a fair trial and the rule of law principle " (resolution of the CCU No. 1-rp / 2016).

On the other hand, when it comes to the formation of structures within the framework of cross-border cooperation and between the levels of public authority, the main criterions for the certainty of the decisions are human rights. This is ensured by democratic standards for the adoption of government decisions involving not only public authorities, but also groups of interest (national, religious minorities etc.), civic organizations and political parties.

The European Court of Human Rights highlights four elements of judicial independence: manner of appointment, term of office, the existence of guarantees against outside pressure - including in budgetary matters - and whether the judiciary appears as independent and impartial (*Campbell and Fell v. the United Kingdom*, § 78).

Lord Irvine of Lairg in Case Boddington v British Transport Police stressed that:

`It is well recognized to be important for the maintenance of the rule of law and the preservation of liberty that individuals affected by legal measures promulgated by executive public bodies should have a fair opportunity to challenge these measures and to vindicate their rights in court proceedings`.

The requirement for independence and impartial court is the Achilles heel of Ukrainian judiciary. The defining points of the guarantees of independence of judiciary are the procedure for selection of judges, interference in the process of trial of politicians and senior officials, as well as problems in justification of judgments.

For example, the selection of judges of the Constitutional Court carried out on a competitive basis for the parity principle – for six judges appointed Verkhovna Rada, the President and Congress of Judges each of these authorities. Recent changes to the Constitution of Ukraine the procedure for selecting judges of CCU have improved. However, in the Verkhovna Rada, in contrary of the guarantees of the independence of the Constitutional Court and the provisions of the Constitution, judges of CCU by the competition may be recommended as a political entity, parliamentary factions.

**The Rule of Law Doctrine and Discretion**

The exercise of powers based on the law provides for some of discretion. However, discretion is not arbitrary and can not be determined solely by the options defined by law, or solely for the purpose of the authority. Today is believed that exists ‘a better understanding of the necessity and value of discretionary power in many branches of public administration, in order that varying circumstances as well as the needs of justice in individual cases can properly inform the making of decisions’. Therefore, there are requirements for the implementation of discretion, based on respect for human rights and legitimate goals, which should be based on a balance of private and public interests.

As stressed by Kevin Stack, the rule-of-law burden of creating coherence falls upon agencies and courts; they have a responsibility to implement the statutes they administer in ways that promote the coherence of law, including implementing their statutes in a way that is consistent with constitutional considerations and other fundamental values. This follows from the principle of legitimate expectations. If the question of the relationship between the levels of power, in this context to talk about the requirements for participation in the various levels of government in decision-making process. Simultaneously, such a mechanism of delegative democracy is limited by the principle of subsidiarity, according to which the exercise of certain powers depends on the scope of the objective and the available resources at the appropriate level of government.

The practice of arbitrary application of the law to the rule of law are contradicts. Therefore, it is no coincidence that David Calcutt, in his report on the situation in Cyprus, stressed (Cmnd 9781/1986): `In our society, it is for Parliament and not for investigators, however genuinely and well-motivated, to decide if and when, and in what circumstances, the interests of an individual should be subordinated to the interests of society as a whole`.

Again, political demonstrations, industrial action and other forms of militant activism have on occasion provoked reactions from authority going beyond what is proper or legal. This is important to ensure national interests, especially in the light of the experience of counter fighting the police and intelligence services of Ukraine against subversion.

The process of transferring the sovereign powers of the state to supranational institutions and creation of new rules and procedures involves complex adoption of government decisions. Such decisions should be based on trust and should ensure the inclusion of the broadest possible range of stakeholders in the process of their adoption. A combination of formalized and unformalized procedures of rules formulation and implementation, as well as a combination of state and non-state subjects in this process, change the core of law at the regional and global levels. Such inter-, trans- and supranational factors quite often become a significant driver of reform of the national legal system.

**Conclusions.** The doctrine of the rule of law is gradually becoming an integral part of the institutional design of the legal system of Ukraine. Despite the slightly scholastic discussions regarding the translation of the term '' the rule of law'', there is an agreement that this doctrine defines formal and substantive requirements for the process of law-making and law implementation. Most of the problems in implementing the rule of law in Ukraine are institutional and instrumental. First of all, the structures of social interaction distort the essence of this process. Take the stereotypes of powers holders as an example, the purpose of serving the people, the creation of res publica quite often do not act as a key goal of their activities. This is accompanied by excessive formalism, which gelds the world of ideas of constitutionalism, generating arbitrary use of law. At the same time, new models of judicial decision-making and some legislative acts based on best practices at the world or regional level are emerging. It is also important to implement the decision-making process in accordance with the Ukrainian constitutional tradition based on freedom, democracy and limited government.

**Bibliography**

*Rule of Law Cheklist*, CDL-AD(2016)007, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), p.53

Albert Venn Dicey, *Основы государственного права Англии. Введение в изучение английской конституции, 2nd edition,* Moscow 1907, p.671

Colin Turpin, Adam Tomkins, British government and the constitution, 6th edition, Cambridge University Press, 2007

Trevor Allan, *Конституційна справедливість. Ліберальна теорія верховенства права*, Publishing House «Києво-Могилянська академія», Kyiv 2008, p.385

*Entick v Carrington* (1765) 19 St Tr 1029 (Court of Common Pleas).

Tamanaha Brian, *Верховенство права: Історія. Політика. Теорія*, Kyiv-Mohyla Academy, Kyiv 2007, p.208

1. *Boddington v British Transport Police* [1999] 2 AC 143, 161.
2. Kevin M. Stack, An Administrative Jurisprudence: The Rule of Law in the Administrative State, *Columbia Law Review*. Vol. 115. No. 7.