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ВЕРХОВЕНСТВО ПРАВА (ПРАВОВЛАДДЯ) В УМОВАХ, ЩО СПРИЯЮТЬ ЗАПОБІГАННЮ СВАВІЛЬНОМУ ВТРУЧАННЮ ВЛАДИ У ПРАВА ЛЮДИНИ

Анотація. *У статті розкривається ціннісний потенціал верховенства права в умовах, що сприяють процесу змістовного наповнення та розвитку принципу запобігання свавільному втручанню органів влади, напрям і спрямованість якого визначаються безумовним пріоритетом прав людини. Вони стають тим орієнтиром, під впливом якого будується і оснащується юридичними засобами вітчизняна правова система, налагоджується взаємодія із урядовою системою, заснованою на здійсненні широкої довільної або дискреційної влади. Наголошується на особливостях впровадження принципу запобігання свавільному втручанню органів влади, обумовлених специфікою встановлення підстав, передбачення варіативності реалізації дискреційних повноважень цих органів, а також меж, способів, умов (обставин) такої реалізації задля досягнення рівноваги між публічними і приватними інтересами. Звертається увага на необхідність забезпечення міцності логічної конструкції «дискреція – реалізація – публічні і приватні інтереси» в разі виникнення в демократичному суспільстві потреби в обмеженні прав і свобод людини. Метою дослідження є розгляд важливого елемента верховенства права (правовладдя), зміст якого полягає в передбаченні національним законодавством правових засобів захисту від свавільного втручання органів влади у права, гарантовані Конвенцією про захист прав людини та основоположних свобод, а також здійснення кроків в напрямі визначення найприйнятнішого для правової системи України, варіанту вимог цього принципу, з поміж яких особливе місце відводиться забезпеченню достатньості повноважень владних інститутів та їх посадових осіб. Підґрунтям для цього слугують історико-герменевтичні, ціннісні (аксіологічні) уявлення про походження та рівень практичної застосовності вимог щодо запобігання (недопущення) надмірному втручанню органів влади в права людини в умовах конкретного суспільства і держави, спеціальні юридичні (порівняльно-правові, аналітичні) методи.*

Ключові слова: *верховенство права, права людини, принципи, запобігання свавіллю, публічні і приватні інтереси, дискреція.*

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RULE OF LAW UNDER CONDITIONS PROMOTING PREVENTION OF UNWARRANTED INFRINGEMENT ON HUMAN RIGHTS BY AUTHORITIES

Abstract. *The article reveals the value potential of the rule of law under the conditions that promote the process of content acquisition and development of the prevention principle of unwarranted infringement on human rights by authorities. Its direction is defined with absolute precedence of human rights. They are converted into the benchmark, which affects the development of domestic legal framework and provides it with relevant legal remedies. It arranges the interaction with the government system, which is based on the exercise of wide arbitrary or discretionary power. The author focuses on the introduction peculiarities of the prevention principle of unwarranted infringement by authorities caused by the specifics of reason definition, stipulation of varied implementation of discretionary powers by these authorities as well as the limits, ways, and conditions (circumstances) of such implementation aimed at the balancing private and public interests. The attention is concentrated on the need for the provision of strong and clear structure «discretion – implementation – public and private interests» provided the need for the restriction of human rights and freedoms arises in democratic society. The research is aimed at the consideration of the important element of the rule of law. Its content comprises national law stipulation of legal remedies against unwarranted infringement on the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms as well as taking steps towards the definition of the version of this principle requirement that is the most appropriate for the Ukrainian legal system. The provision of adequate authority to government institutions and officials takes a particular place in this hierarchy. On the one hand, it should be based on the historic hermeneutic ideas and values (axiological concepts) concerning the origin and practical application of the requirements on the prevention (avoiding) of unwarranted infringement on human rights by the authorities implemented within a particular society and state. On the other, it should involve specific legal (comparative legal and analytic) remedies.*

Keywords: *rule of law, human rights, principles, prevention of arbitrary actions, public and private interests, discretion.*

INTRODUCTION

The experts of Rule of Law Research Centre at National University of Kyiv Mohyla Academy supported by the European Commission for Democracy through Law (the Venice Commission) and the Council of Europe Office in Ukraine have carried out the applied research of practical tools for the implementation of the rule of law and its components. It has resulted in the preparation of the special manual «Rule of law

checklist at national level: case of Ukraine». It comprises a detailed list of criteria presented with the set of questions essential for the evaluation of the state of the rule of law in both law-making and enforcement activities. In addition, this manual contains the algorithm for searching better forms and methods to evaluate the state of the rule of law. According to the authors, it shall be a continuous process of daily use of the regulations of the law combined with the awareness of the essence and content of the rule of law and its components. In this case modern concept of the rule of law dominates. It is treated as a phenomenon closely connected with a human, his or her rights and freedoms as a versatile value regardless nations, ideologies, religions, etc [1, p. 24–25].

Deeper research of human rights, their content and scope is automatically launched by the construction of the rule of law in the context of human rights as well as an inevitable interdependence of scientific achievements in this area, organization of public authority, and identification of the essence of the rule of law on the basis of dialectical connection of «componential» and «integral» approaches [2, p. 13]. That, in its turn, produces quite a different concept of human rights, compared to the one that had to be created in the minds of the representatives of communitarian camp [3, p. 73]. Due to the efforts of prominent German scientist, Robert Alexy this concept of human rights is represented by sufficient and necessary discursive and theoretical arguments, including the arguments for not only private but also public autonomy of human rights. Among them, there is an argument for democracy, which prima facie indicates the necessity for the existence of the legal framework with particular content and structure [3, p. 85, 95–96]. All of them are actually intended to contradict one of the most important meanings and contexts and the entire concept of the rule of law by reputable English scientist constitutionalist Albert Dicey, which is presented in his fundamental work «Introduction to the Study of the Law of the Constitution». First, the scientists treated the rule of law as some kind of opposition to any government system based on the exercise of wide and unwarranted arbitrary power by the officials [4, p. 141].

As for now, there is a huge array of international instruments and patterns of theoretical ideas. Due to them the rule of law acquires peculiar construction in the manner typical for «common heritage of political traditions, ideals, and freedoms» [5], European values [6, p. 70]. This phenomenon can be also explained by some powerful impulses [7, p. 743, 764, 783, 785–791; 8, 544, 571, 573; 9], integral orientation of all the states to the restriction of the abuse of power, and provision of adequate protection against it [10, p. 180, 185, 189, 191], etc.

Despite this fact, the development of compulsory international standards in the area of human rights still requires new sense features of the rule of law. They should be considered in case of the need and opportunity for the identification of practical application of its elements only for the formulation of human right problem in terms of the state and putting it to the agenda [11, p. 209].

Our research considers the important element of the rule of law, which concerns the national law stipulation of legal remedies for unwarranted infringement by authorities

on the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter Convention). Moreover, the steps towards the determination of the most appropriate variant of these principle requirements for the Ukrainian legal framework are taken. The provision of the sufficiency of the powers of government institutions and their officials takes a special position among these requirements.

1. MATERIALS AND METHODS

In order to reach this aim, the historical and hermeneutical, value-based (axiological) ideas and concepts about the origin and level of practical application of the requirements for the prevention (avoiding) of the excessive authority infringement on human rights within a particular society or state are examined. As well as specific legal (comparative legal and analytic) remedies are involved.

The experience of reputable expert bodies and institutions in modern democratic society, which have been studying the value potential of the rule of law in terms of its implementation into law-making and enforcement activities of varied components of this principle alongside with the preventive measures of disproportionate restrictions of human rights [12; 13], shows high efficiency of such an approach. Since it provides the development of clear and reliable theoretical ground for the establishing and genuine implementation of its efficiency under modern human-centred globalisation transformations [14, p. 143, 154].

The use of heuristic value of scientific, philosophic and special legal methods allows us to consider the opportunity for further consideration of principal requirements for the prevention of arbitrary power while drafting domestic law, developing the methods of public and government administration of a society as well as political and legal system of public life with its own unique atmosphere.

2. RESULTS AND DISCUSSION

Recognition and clear perception of unconditional precedence of human rights and freedoms take place together with the preservation of the principle of the rule of law. It incorporates new constructive and prospective elements, which are primarily directed to the real achievement of mutual state and individual responsibility, legal equality of not only the citizens but also the citizens and the state. Primarily, this equality prioritizes essential human rights in terms of the rights of any community (social group or class, nation, religious denomination, etc.), human rights in the context of the state rights. It also guarantees and protects human and citizen rights and freedoms; provides the conditions for their full enjoyment [15, p. 445] as well as for the other existing requirements mediated by this theoretical and applied aspect of public responsibilities. It is quite an obvious fact, that the list of such requirements includes not only the inadmissibility of violations or disproportionate restrictions of human rights but also the provision of the opportunities for their implementation.

The principle of the rule of law is established by the long-term practice of law-making and law enforcement within different legal frameworks. It produces an important element, whose sense lies in the fact that «national law shall stipulate legal remedies for the protection from the arbitrary infringement by the state authorities on the rights guaranteed by the Convention» (see together with the other sources the judgement of the European Court of Human Rights (hereafter – ECLJ) in the case of Hasan and Chaush v. Bulgaria on 26 October 2000, application №30985/96, p. 84) [16]. The statement of the requirements for «the prevention of arbitrary power» in ECLJ decisions is primarily based on the provision of accessibility, clarity of the formulation of the national law provisions, the predictability of their exercise by defining particular grounds and reasons for granting powers to state authorities and their officials in terms of solving basic issues connected with the human rights and freedoms as well as setting limits for the exercise of such powers.

It should be mentioned here, that the interpretation of the common and well-known phrase «provided by law» («according to the law», «under the law») is used as above all for the national law with the sufficient level of predictability concerns «the relevant instructions to the persons in terms of the conditions and circumstances under which the authorities will have the right to resort to measures which will cause the consequences concerning their rights according to the Convention» (see together with the other sources, the Judgment of ECLJ in case «Olexandr Volkov v. Ukraine» on 9 January 2013, application No 21722/11, p. 170) [17].

In the interpretation of this phrase ECLJ appeals to the law quality, repeatedly setting the requirements for the law to be «accessible to all the interested persons and formulated clearly enough to provide them with the opportunity to regulate their conduct in order to be able to – if the need arises or in case of appropriate consultations – predict to the extent, reasonable under relevant circumstances, the consequences of his or her actions» [18] and meet the principle of the rule of law [19]. It is stressed that for the issues concerning the basic rights, granting legal discretion to the executive authorities in the form of unlimited powers would be incompatible with the principle of the rule of law, which is one of the major principles of a democratic society guaranteed by the Convention. Accordingly, the law shall clearly determine the limits of such discretion granted to the competent authorities and the procedure for its exercising [19; 20]. The attention is focused on the need for the existence of specific procedural safeguards in this context. However, in this key the type and character of the required safeguards will depend to some extent on the character and scope of this infringement [20].

In such a way, the content acquisition and further development of the principle of prevention of authority arbitrary actions take place with the consideration of the sense of the concept «the rule of law» or spirit of legality domination suggested by one of the founders of its theoretical substantiation, professor of Oxford University Albert Dicey at the end of the 19th and beginning of the 20th centuries. The application of articles 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental

Freedoms of 1950 by ECLJ as well as the activity of other bodies of the Council of Europe connected with the application and implementation of the relevant judgements and decisions by ECLJ are accompanied with the ascertaining whether the general provisions (formulations) of the national law are compliant with the Convention. In addition, on the one hand, they should meet common qualitative requirements for the law and correspond to the principle of the rule of law. According to the qualitative requirements for the law, the national law must be accessible enough, clearly drafted and formulated and quite predictable as for its exercise.

The existence of general prohibition of the state infringement on the person's exercise of the rights under these articles can be substituted for the infringement on these rights that can occur only in case of taking into account «the absolute precedence of objective right contrasted to the impact of arbitrary actions». This idea concurrently «excludes any arbitrary actions, prerogative power or even discretional power of the government» [4, p. 147, 152].

Considering the nature and exercise of discretional power in terms of different governmental activities most of modern domestic and foreign scientists and practicians tend to treat them according to the formula «power» as «right and duty combination which can be exercised in public interests only» [21, p. 259]. They are ready to assume the occurrence and existence of discretional powers mainly in case of the need for balancing out the requirements of public interest and protection of human rights in the context of the application of article 1 of the 1st Protocol of the Convention [22].

Turning to the sense of the concept «interest» developed by the mankind, special importance of the protection of rights, freedoms and interests in the area of public relations, where national interests, national security interests, interests of the economic well-being, interests of territorial integrity, public order, health and morality of the population, political, economic, social and cultural interests, interests of society, interests of all the compatriots, citizen's interests, state interests, common interests of village, settlement and town communities, etc. [23], the Grand Chamber of the Supreme Court comes to the definition of «public interest» as the needs, important for the significant number of individuals and legal entities, and met by the subjects of public administration in accordance with the legally defined jurisdiction [24]. Therefore, according to the opinion of the Supreme Court judges, public interest is nothing but the specific body of private interests [24].

On the basis of the tradition of the rule of law, we may expect practically nemine dissentiente in the scientists' ideas that the reliability of logical structure «right and duty combination – exercise – public and private interest» lies in the «respect to human rights» [25, p. 8]. Since the complicated in its structure system of correlations between public and private interests not only within legislation but objective law in general assumes some variability of the exercise of discretional powers, as well as its limits, ways, conditions (circumstances). Concurrently, according to the experience of developed countries, the inalienable and imprescriptible human rights and freedoms

preserve their role of the basis of «check and balances» in the state power which from the viewpoint of M. I. Koziubra, usually tends to get out of control of the society. According to his opinion, they constitute the restrictive barriers which neither legislative, nor executive, nor judicial powers can overcome discretionally» [26, p. 36].

The definition of discretionary power presented in the Recommendation No. R(80)2 of the Committee of Ministers concerning the exercise of discretionary powers by administrative authorities, approved at the 316th meeting of this body on 11 March 1980 has its supporters. According to it, the discretionary power is the power, which can be exercised by the administrative authority while taking a decision with some extent of free discretion, i.e. when such authority is entitled to choose between several legally admissible decisions the most appropriate one under the particular circumstances [27]. This definition as well as its citation in Ukrainian case law [28] often does not provide a sufficient response on the question whether any powers are discretionary or not. Since the exercise of wide discretionary power is always a matter of interest. In some cases (situations), the existence of such powers is mainly recognized on the basis of special permit principle, according to which state and local authorities, their officials have a responsibility to act only on the basis of or to exercise their authority within the framework, stipulated by the Constitution and Laws of Ukraine. It gives the reason to monitor and verify draft laws, existing laws and administrative practice systematically as for their compliance with the standards laid down by the Convention [29] as well as to control the efficiency of current national remedies in respect of the Convention infringement and violation under any circumstances and in case of the need for the development of new efficient remedies of such type [30] in general.

Provided under different circumstances only in terms of the concept of standard-requirements for the rule of law [1, p. 119], developed during the centuries to affirm and provide human rights in democratic society, discretionary powers are exercised according to the list of standard-requirements such as constitutional principles and up to procedural requirements for their exercise in law-making and enforcement activities. The studies of each of them at the very stage of content identification (construction) involves the substantiation of the legitimacy of exercising or not exercising «some action» or solving a problem in «some way». Therefore, the issue of the measures and remedies the body should employ in order to respond on the conduct or activity of a particular subject arises. This issue can be verbalized as the opportunity «to act or not to act, and if to act to choose the solution or decision from the list directly or indirectly provided by the law» [31].

The exercise of discretionary powers according to the recommendations presented in interpretive acts, e.g. in Methodology of carrying out anti-corruption expert examination, approved by the order of the Ministry of Justice of Ukraine on 24 April 2017 [32], allows consistent actions directed to the support of coherent approach to the interpretation of discretion, accepted in a particular area of human activity and concurrently paying attention to the completeness of the examination of the issue of

discretionary powers, their limits and conditions under which they are transformed into corruptogenic factors. «The Institute of Legislative Ideas», taking into account the definition of the concept of discretionary powers, their features, identifiers and keywords, which allow us to find such kind of powers, etc., assures us that the issue of discretionary powers is explained «full enough» or even «detailed enough and more complete than in some anticorruption methodologies and recommendations of foreign countries» [33].

CONCLUSIONS

Therefore, the principle of the rule of law with all its components is vital for the recognition and unconditional acceptance of human right precedence. All its components should be adequately reflected in law-making and enforcement activities and vice versa due to the existence of this principle and its exercise the opportunity for the provision of the appropriate respect to human rights as the protected value appears. Constructive and prospective elements developed thanks to the efforts of many generations of philosophers and legal scholars come into play. Their content lies in the national law provision of some remedies for the protection against the unwarranted authority infringement on the human rights guaranteed by the Convention. Nowadays their existence complies with the achievement of the balance between public and private interests. Any accessible, clearly formulated and predictable as for their application provisions of national law are approved in strict accordance with the requirements of public (common and general) interest and protection of human rights.

A significant achievement of the examination of the correlation system with complicated structure of relations between public and private interests, not only within legislation but objective law in general appears to be its dynamics represented with the variability of discretionary power exercise by the public authorities and their officials as well as the limits, ways, conditions (circumstances) of such exercise. Taking into account the tradition of the rule of law, ECLJ practice of the application of articles 8, 9, 10 and 11 of the Convention as well as the activity of other bodies of the Council of Europe based on the application and exercise of relevant ECLJ judgements almost general prohibit to infringe on the exercise of the human rights stipulated by these articles functions on the daily basis being addressed to the public authorities and officials. The infringement on these rights is accepted provided it is considered necessary and appropriate for the needs of a democratic society for the restriction of human rights and freedoms.

RECOMMENDATIONS

Filled with real sense ever new constructive and progressive components of the rule of law allow the scientists, public authorities and officials as well as the representatives of different social groups to unite around its multiple interpretations and focus on the substantiation of the need for the prevention of authority arbitrary actions. To this end, they should single out and consider the major requirements, which contribute to

the health of domestic legal system and optimization of its interaction with the government system, based on the exercise of wide discretionary powers. These requirements have emerged due to the accepted approaches to the treatment of the prevention of excessive authority infringement on the basic human rights and freedoms as well as thanks to the ECLJ practice of the application of relevant provisions of the Convention. They should be taken into account in the process of domestic law-making drafting, official interpretation and definition of the content and volumes of human rights and freedoms as well as such criteria for the legal restriction under such modern challenges and threats as adequacy.

Prevention of the authority infringement on human rights is the requirement which should serve the foundation for scientific development of the forms and methods of public administration in modern society as well as social initiation and enhancement of the existing political and legal regime.

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