



Rule of Law: Supranationalization from the Perspective of Central and Eastern European Countries (Ukraine)

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Abstract. The principle of the rule of law is a fundamental value on which the European Union (EU) is based on and originates from the constitutional traditions of the EU Member States. Ukraine not only announced its desire to join the EU but also established, in the Preamble to the Constitution, its European geopolitical choice and the European identity of the Ukrainian people. Negotiations on joining the EU will begin soon, among the main ones being the requirement that Ukraine's legal system should conform to the principle of the rule of law, which is universal, but its meaning and elements are not clearly defined. Therefore, for the success of these negotiations, it is necessary to understand the meaning and elements of this principle, as the principle of the rule of law as a fundamental value has several manifestations and different meanings. From this perspective, the importance attached to this principle by the European Commission in its respective Communications, as well as by the Venice Commission in its Reports, will become the legal basis for these negotiations. This study aims to 'juridicize' the issue of understanding the principle of the rule of law from a European and Ukrainian perspective, and it focuses not only on documents of the relevant European institutions but also on the doctrinal understanding of this principle in Ukraine and the activity of the Constitutional Court of Ukraine regarding the application of the provisions of Article 8 of the Constitution of Ukraine, which enshrines this principle. This paper comprises five sections, each addressing some facets of this principle, with an introduction and a conclusion: (1) Ukrainian aspirations towards EU membership – importance of the rule of law principle, (2) the rule of law principle in Ukraine – in search of doctrinal meaning, (3) meaning of the rule of law principle in studies of leading Ukrainian scholars, (4) 'golden standard' of the rule of law principle: the contribution of the Venice Commission and its recognition by the Constitutional Court of Ukraine, (5)

international and European law in the jurisprudence of the Constitutional Court of Ukraine, and (6) the rule of law principle and its elements in the Constitutional Court of Ukraine jurisprudence.

Keywords: rule of law, Dicey, Bingham, Rule of Law Checklist, Venice Commission reports on the rule of law, legal certainty, legitimate expectations, proportionality, Ukraine

1. Introduction

The rule of law principle is not only one of the most important foundations of the Ukrainian constitutional system but also the basis of the legal systems of all European countries, including members of the Council of Europe and the European Union (EU). It is the basis of a unified European legal order, an important aspect of European identity, and part of the common European constitutional tradition of EU Member States.

As the basis of legal systems in Western legal tradition, this principle has been quickly gaining universal importance after the adoption of the Statute of the Council of Europe following the Second World War, where the principle of the rule of law is enshrined in the Preamble.¹ This means that all the countries of the Council of Europe (currently totalling 46) should not only recognize this principle at the level of their own constitutions but also effectively implement it in national legal systems.

The principle of the rule of law has progressively become a dominant organizational model of modern constitutional law and international organizations (including the United Nations and the Council of Europe) to regulate the exercise of public powers. It ensures that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.²

Against this background, the current paper focuses on how this universal and supranational principle affects the legal system of Ukraine, what constitutes its content, what elements it consists of from the perspective of Ukrainian scientists and in the jurisprudence of the Constitutional Court of Ukraine, as well as how to ensure its effective operation in the context of Ukraine's European integration in connection with the acquisition of the status of a candidate country for EU accession.

1 Statute of the Council of Europe, 1949.

2 European Commission, 2014.

2. Ukrainian Aspirations towards EU Membership – Importance of the Rule of Law Principle

The Constitutional Court of Ukraine notes that one of the foundations of the Ukrainian constitutional system is the rule of law, which is expressed through the following formula: ‘The principle of the rule of law is recognized and effective in Ukraine’ (part one of Article 8 of the Constitution of Ukraine). ‘Rule of law’, as an inseparable element of the system of values that form the basis of the modern European legal order, belongs to the triad of principles of the common heritage of European nations, along with such components as genuine democracy and human rights. Within the common legal space of Europe, there is a consensus on the core elements of the rule of law.³

According to Article 2 of the Treaty on European Union (TEU), the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. These values, including the rule of law principle, are common to all Member States. It means that the concept of the rule of law occupies the central position among common European values, but it also serves as a *conditio sine qua non* for the entire functioning of the EU as an area of freedom, security, and justice.⁴

The principle of the rule of law underlies the activities of EU institutions, in their relations with the EU Member States, and is an important criterion for European integration and the evaluation of Member States’ activities and their internal policies. This principle also acts as one of the most important criteria for cooperation and relations with third countries, especially with states that have been granted the status of candidate for EU membership. Ukraine is part of these countries.

Federal Chancellor Olaf Scholz – as he rightly noted in his speech at the Charles University in Prague on Monday, 29 August 2022 – raised the issue of a universal understanding of the principle of the rule of law with the aim of its practical application and possible correction of the practice of EU Member States that violate it:

Peace and freedom, democracy and the rule of law, human rights and human dignity – these values of the European Union are a heritage we gained together. At this of all times, facing the renewed threat to freedom, pluralism and democracy in the east of our continent, we feel that connection especially strongly.

3 Decision of the Constitutional Court of Ukraine, 14 July 2021 No. 1-p/2021.

4 Šišková, 2019.

At the same time, I would prefer not to have arguments about the rule of law go all the way to court. What we most need, next to all the procedures and sanctions, is an open dialogue at the political level about failings, which exist in all countries. The Commission's report on the rule of law, with its country-specific recommendations, provides a good basis for this. We will keep a close political eye on the implementation of those recommendations and do our own housekeeping too. After all, the rule of law is a fundamental value which should bind our union together. Especially at this time, with autocracy challenging our democracies, it is more important than ever.⁵

The rule of law is enshrined in Article 2 of the TEU as one of the founding values of the Union. Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes, among others, principles such as follows: legality, implying a transparent, accountable, democratic, and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts; effective judicial review including respect for fundamental rights; separation of powers; equality before the law. These principles have been recognized by the European Court of Justice and the European Court of Human Rights.⁶

Communications from the Commission to the European Parliament, the European Council (both COM/2014/0158 final and COM/2019/163 final) on the rule of law principle contain a very important point – this principle is no longer just a valuable category of a moral and philosophical nature but also a set of specific elements that make up the essence of this principle, a set of principles (sub-principles) against which the Commission and other EU institutions will assess compliance by Member States and candidate countries in order to ensure the proper implementation of articles 2 and 7 of the TEU.

Besides Article 2 of the TEU, especially for candidate countries for EU accession, such as Ukraine, Article 49 of the TEU states, 'Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.'

In Copenhagen in June 1993, the European Council concluded,

Accession will take place as soon as a country is able to assume the obligations of membership by satisfying the economic and political conditions required.

5 Speech by Federal Chancellor Olaf Scholz at Charles University in Prague on Monday, 29 August 2022.

6 European Commission, 2019.

Membership requires: that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; the existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union; the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.⁷

Therefore, compliance with the principle of the rule of law becomes an important task for all state authorities in Ukraine and, first of all, for the Constitutional Court of Ukraine, which must, when applying Article 8 of the Constitution of Ukraine, form standards and define the elements of this principle as part of the Ukrainian Constitution through the interpretation of this article.

The practice of the Constitutional Court of Ukraine in recent years indicates understanding of the application of constitutional provisions in the pan-European context, acting in accordance with the course of future membership in the EU announced in the Constitution of Ukraine. This concerns not only the understanding of the fundamental constitutional principles as the rule of law in accordance with its understanding and practice of its application in other EU Member States but also, more broadly, the need to adapt Ukrainian legislation and the practice of its application to EU *acquis communautaire*. As the Constitutional Court noted in the decision on constitutionality of special confiscation in criminal law,

combating crime should be carried out exclusively by legal means with strict observance of human rights and freedoms, as well as the principles of the rule of law and the superiority of the Constitution of Ukraine.

Thus, the settlement of relations with the application of special confiscation by disputed articles of the Criminal Code of Ukraine was carried out with the aim of adapting, unifying, and harmonizing the national legislation of Ukraine with the acts of the European Union as components of the European integration process of Ukraine. In turn, the European integration of Ukraine requires the establishment of genuine democracy, respect for human rights and the rule of law as pan-European values.⁸

Ukraine confirmed its European choice at the highest legal level by amending the Preamble to the Constitution of Ukraine by the Law on Amendments to the Constitution of Ukraine dated 7 February 2019. These European aspirations were reflected in the following constitutional formula: ‘confirming the European

7 European Commission, 2022.

8 Decision of the Grand Chamber of the Constitutional Court of Ukraine, 30 June 2022 No. 1-p/2022. Translation by the author. Unless otherwise specified, all translations of non-English sources are by the author.

identity of the Ukrainian people and the irreversibility of Ukraine's European and Euro-Atlantic course'.

As the Ukrainian constitutionalist, former judge of the Constitutional Court of Ukraine Professor Mykola Kozyubra rightly comments on this occasion,

...the changes of the preamble to the Constitution of Ukraine testifies not to the correction of the historical past of the Ukrainian people and the moment (prerequisites, motives, and goals) of its adoption but rather to the confirmation of the Ukrainian people of their European identity, conditioned by all the previous constitutional and legal developments of Ukraine. The Revolution of Dignity became only the 'constitutional moment' that strengthened the sense of identity and actualized these changes. The first significant step towards the implementation of the mentioned course has been made – Ukraine has officially become a candidate for membership of the European Union.⁹

The process commenced on 28 February 2022, when Ukraine submitted its application for EU membership. On 17 June 2022, the Commission issued its opinion and recommended to the Council that Ukraine should be given the perspective to become member of the EU and that the country be granted candidate status on the understanding that seven steps, mainly in the rule of law area, are taken. On 23 June 2022, the European Council recognized the country's European perspective and decided to grant Ukraine the status of candidate country. The European Council invited the Commission to report to the Council on the fulfilment of the seven steps as part of its regular enlargement package.¹⁰

These seven steps could be considered a package into the sphere of 'the rule of law', which Ukraine needed to address to progress on the path to the EU as the condition to open negotiations for the accession:

1. enact and implement legislation on a selection procedure for judges of the Constitutional Court of Ukraine, including a pre-selection process based on evaluation of their integrity and professional skills, in line with Venice Commission recommendations;
2. finalize the integrity vetting of the candidates for the High Council of Justice members by the Ethics Council and selection of the candidate to establish the High Qualification Commission of Judges of Ukraine;
3. further strengthen the fight against corruption, in particular at high levels, through proactive and efficient investigations, and a credible track record of prosecutions and convictions; complete the appointment of a new head

⁹ Koziubra, 2024.

¹⁰ European Commission, 2023.

of the Specialized Anti-Corruption Prosecutor's Office by certifying the identified winner of the competition and launch and complete the selection process and appointment for a new Director of the National Anti-Corruption Bureau of Ukraine;

4. ensure that anti-money laundering legislation is in compliance with the standards of the Financial Action Task Force (FATF); adopt an overarching strategic plan for the reform of the entire law enforcement sector as part of Ukraine's security environment;
5. implement the Anti-Oligarch law to limit the excessive influence of oligarchs in economic, political, and public life; this should be done in a legally sound manner, considering the forthcoming opinion of the Venice Commission on the relevant legislation;
6. tackle the influence of vested interests by adopting a media law that aligns Ukraine's legislation with the EU audio-visual media services directive and empowers the independent media regulator;
7. finalize the reform of the legal framework for national minorities currently under preparation as recommended by the Venice Commission and adopt immediate and effective implementation mechanisms for the *acquis communautaire*.¹¹

All these requirements were met by Ukrainian authorities, and the negotiations for the accession should be opened. Certainly, these are not the requirements of the principle of the rule of law in the legal sense but rather relate to the political sphere as essential prerequisites to start the negotiations. At the same time, it is important to understand the meaning of the principle of the rule of law and its constituent elements in the legal sense.

2.1. The Rule of Law Principle in Ukraine – In Search of Doctrinal Meaning

As stated in the first part of Article 8 of the Constitution of Ukraine: 'In Ukraine, the principle of the rule of law is recognized and effective'.

To understand the doctrinal meaning of this constitutional provision, it is necessary to refer to the scientific and practical commentary on the Constitution of Ukraine, which was published in 2024 under the auspices of the Constitutional Court of Ukraine and the National Academy of Legal Sciences of Ukraine. The author of the comment on Article 8 is the former judge of the Constitutional Court of Ukraine and a member of the Venice Commission on behalf of Ukraine Serhiy Holovaty. In his opinion, as the first component of this formula, which contains the imperative to recognize the principle of the rule of law by the state, Ukraine

11 *Idem*, pp. 9–11.

implemented it by taking on the corresponding obligation under international law (when it joined the Statute of the Council of Europe and ratified the European Convention on Human Rights – the ECHR) and placed it at the highest regulatory level – constitutional. Together with other principles of the same level contained in Section I of the Constitution, it forms the system of fundamentals of the constitutional order in Ukraine. Later, it was recognized in a number of ordinary Ukrainian laws, in particular and above all, in those related to the judiciary.¹²

According to S. Holovaty, regarding the second part of the constitutional formula, which indicates that the principle of the rule of law is effective in Ukraine, it refers primarily to the set of principles, institutions, mechanisms, and procedures that are important for a person to be able to protect himself from the arbitrary power of the state. This component is aimed mostly at the requirement of the presence in the national political and legal systems of those relevant institutional (structural) elements that, in combination with the relevant legal procedures, ensure the institutional and procedural mechanisms of the rule of law. In essence, it is a reflection of the legal *maxim ubi jus ibi remedium*, which necessarily requires, first of all, the presence within the framework of the national legal system of that set of relevant institutions, mechanisms, and procedures with the help of which the theoretical and institutional basis for the effective protection of human rights and fundamental freedoms is created.¹³

For a long time, the post-Soviet understanding of law as the will of the ruling class (later, of the entire Soviet people), embodied in law, prevailed in Ukraine. When the text of the Constitution of Ukraine was adopted in the Parliament in June 1996, some deputies proposed to replace the reference to the rule of law (*верховенство закону*) in Article 8 with another formula. The motivation was as follows: No one can conclusively formulate a clear definition of this principle, and scientists, in their monographs, assign different meanings to this precept. However, consequently, the point of view that should be left as it is – precisely the principle of the rule of law – prevailed, since Ukraine has already joined the Charter of the Council of Europe, where this principle is decisive in the activities of this international organization. This is a clear example that a proper understanding of this principle in Ukraine is hindered by the heavy legacy of the Soviet legal system, which was based on the principle of the rule by the law (Soviet legality), legal formalism, and positivism, which, in fact, covered up the arbitrariness of the state power towards its citizens. Numerous concepts and ideas are connected with the rule of law, especially in the modern period in Ukraine. When characterizing this principle, it should also be taken into account that when a certain ideal begins to ‘take root’ in the mass consciousness, its meaning departs from the original, that is, from the meaning that was laid down

12 Holovaty, 2024.

13 *Ibid.*

at the beginning. In today's conditions, this ideal of Anglo-Saxon law 'overlaid' the tradition of political and legal construction of the Soviet period, which, paradoxically, continues to influence the modern legal system of Ukraine.

From this perspective, the correct understanding of Article 8 of the Constitution of Ukraine is decisive. The opinion that the legal order in a modern, developed democratic society is guided not only by normative legal acts but also by legal principles at a fundamental level, which reflect and embody the value and moral qualities of law, can serve, in certain cases, as a criterion for distinguishing law and statutes. Thanks to the recognition and operation of this principle, law can no longer be identified only with a set of normative legal acts but is considered a phenomenon that is directly related to such values of natural law as justice, reasonableness, equality, purposefulness, and proportionality, among others.

The principle of the rule of law in the legal system is always responsible for justice, especially in the field of law enforcement, as the goal of legal regulation in society is to achieve justice not only in an abstract sense but also by considering specific life circumstances. Sometimes, it is impossible to guarantee this justice only through the application of formal legal provisions (norms of law) because a strengthened regime of legality always leads to the establishment of an authoritarian regime. However, this rule works not only in the absence of democracy but also in conditions of the normal functioning of the legal system, when formal regulations become so formal that they are no longer able to ensure justice and protect human rights. Therefore, the application of the principle of the rule of law occurs in those cases when it is necessary to depart from a narrow understanding of the requirements of a formal normative prescription to protect justice, or to make a decision contrary to these requirements.

The main idea of the legal system is compliance with the principle of the rule of law in the process of administration of justice in the resolution of each specific case to which a person is a party. Therefore, it can be argued that the principle of the rule of law is illusory in a country where the state does not fully ensure the right of access to a court in which a person will defend their rights, where there are no guarantees of the right to a fair trial, starting from the right of access to a court, its impartiality and independence, the fairness of its decisions, and their proper implementation and enforcement.

The same applies to the extension of the jurisdiction of courts to all legal relations arising in the state (part 2 of Article 124 of the Constitution of Ukraine – 'The jurisdiction of the courts extends to all legal relations that arise in the State.'). This will mean that judges should start with the analysis of compliance with the principle of the rule of law of certain legal relationships that have become the subject of consideration in courts when resolving any legal dispute. Therefore, despite the fact that the principle of the rule of law received its highest positive confirmation in the Constitution of Ukraine and international treaties to which

Ukraine is a party, its content should receive additional disclosure through the activities of judicial authorities (especially the Constitutional Court of Ukraine), as it is precisely through law enforcement, in the process of judicial protection of human rights and fundamental freedoms, that the enormous potential of this principle to ensure the justice of court decisions becomes clear.

It is difficult to provide a single, clear definition of this principle, because its main meaning is to ensure the priority of the rule of law in society over other social normative regulators, which is considered from the standpoint of the doctrinal views of different schools of law (i.e. the understanding of law is pluralistic and therefore cannot be reduced to a single, definitive definition); this makes it impossible to show the arbitrariness of state power and ensures the realization of basic rights and freedoms and their corresponding state obligations. In any case, the principle of the rule of law cannot be equated with the principle of the supremacy of normative legal acts of the state (laws), which implies a more active role of the judiciary, and cannot be considered only in the abstract sense, that is, separately from the activities of the judiciary and other state authorities regarding the application of this principle.

In the modern period, based on the analysis of doctrinal sources and practice of constitutional courts and the European Court of Human Rights, it can be argued that the principle of the rule of law includes the following components: 1) it reflects the way of organizing societal life on legal bases, as opposed to anarchy, and is also a means of preventing arbitrary and anti-democratic rule, and in this sense it coincides with the definition of constitutionalism; 2) it reflects the moral foundations of law, that is, it is a manifestation of natural law in modern legal systems together with the principles of justice, proportionality, equality, purposefulness, reasonableness, etc., and in this sense it is the main criterion for recognizing laws as illegal, serving as a guarantor ensuring the fairness of state legal acts; 3) it is a means of organizing an appropriate legal system (the principle of legal certainty, stability, and trust in the law; the principle of no punishment without the law; the principle of legality; the prohibition of undue discretion and the retroactive effect of normative legal acts; independent judicial power and judicial control; the principle of the unity of judicial practice and *res judicata*; etc.); 4) it serves as the basis of the process of limiting and 'binding' the state with human rights and basic freedoms; the essence of this idea is most accurately conveyed in part 1 of Article 8 of the Code of Administrative Procedure of Ukraine, the content of which is that the court, when deciding a case, is guided by the principle of the rule of law, according to which, in particular, a person and their rights and freedoms are recognized as the highest values and determine the content and direction of state activities.¹⁴

14 Shevchuk, 2010.

Therefore, the principle of the rule of law does not negate the principle of legality, which is an integral part thereof, taking into account the fact that laws must be legal and correspond to human rights and fundamental freedoms. From this perspective, legal literature notes that the principle of the rule of law has a formal and substantive aspect. The formal aspect of the principle of the rule of law means that the state must act in accordance with the law and be subject to its effect; the substantive aspect implies that there are standards that determine the essence, value, and moral characteristics of positive law, derived from human rights and fundamental freedoms and from the principles of natural law.

The formal characteristics of the principle of the rule of law include such elements as follows: bringing to legal responsibility only on the basis of violation of legal norms; detention or deprivation of liberty, which must be carried out in accordance with the procedure established by law; the enactment of legal acts in accordance with the legally established powers and procedures; the activity of state bodies on the basis of legal norms and in legal forms; the activity of the executive power in accordance with the law; the lack of discretionary powers of state bodies applying the criminal law; exercise of discretionary powers, which should be limited by law; the action of the executive authorities in relation to citizens, which is authorized by law and carried out in a legal form; guarantee of procedural human rights; the principle of certainty of legal norms; prohibition of the retroactive effect of laws; laws that must be adopted in accordance with the established procedure and meet the criteria of validity, including being officially promulgated, stable, clear to understand, logically coherent, and acting prospectively. The application of laws must meet the criteria of impartiality and independence of the court, while the parties in the case must be given the opportunity to be heard, and court decisions must be justified and consistent with existing practice. In addition, the legal system must have effective means of legal protection of the violated rights and interests of individuals.

The principle of legality as a formal characteristic of the principle of the rule of law also implies that laws are not nominal but actually effective, especially in the context of the state's fight against crime and the investigation of crimes. The same applies to the judicial system, especially in matters of sentencing for committed crimes, so that the public is confident in the effectiveness of the principle of the rule of law.

Under certain conditions, the principle of legality, reduced to an absolute, may contradict the principle of the rule of law, that is, it can be assumed that there is a contradiction between its formal and substantive characteristics. The roots of this contradiction lie in the fact that the formal characterization of the principle of the rule of law does not exclude the fact that the result of state administration or state policy may be the adoption and implementation of legal norms aimed at achieving any state goals, including those that will grossly violate human rights.

The substantive characteristic of the principle of the rule of law is not limited to formal prescriptions of legislation and evaluates legal norms and the practice of their application from the perspective of their compliance with value and moral criteria, as well as human rights and fundamental freedoms. As noted in Ukrainian legal literature on this matter, the rule of law must provide for the necessity and possibility of going beyond formal legality; otherwise, the question of the rule of law is deprived of any independent meaning, and any state, including authoritarian ones, will be considered as applying the principle of the rule of law.¹⁵

2.2. Meaning of the Rule of Law Principle in Studies of Leading Ukrainian Scholars

For a more precise understanding of the content of the principle of the rule of law in the conditions of the Ukrainian legal system, we should turn to its definition in the works of Ukrainian scholars. For instance, Professor P. Rabinovych understands the rule of law as the determining role of law in the relations between all participants of social life – in the life activities of state and non-state organizations, social communities, groups, associations, and all people; this principle has an independent character only in the case when the law itself is interpreted as a phenomenon that arises and exists independently of the state, of the activity of its legislative and other bodies; this principle can be interpreted as a priority in society, first of all, of human rights.¹⁶

Professor M. Kozyubra believes that the principle of the rule of law acquires an independent meaning, different from the traditional theory and practice of the principle of the rule of law, when the law is not identified with the system of universally binding norms of behaviour established or sanctioned by the state, that is, when there is a theoretical and practical distinction between law and higher legality, when legality is considered as a social phenomenon – that is, when it is considered a phenomenon directly related to such fundamental categories as justice, freedom, equality, and humanism.¹⁷

Professor O. Skrypnyuk rightly notes that the rule of law is the fundamental principle of *Rechtsstaat*, without which the exercise of rights and freedoms is impossible.¹⁸ Indeed, Article 1 of the Constitution of Ukraine proclaims that Ukraine is a law-based state, and doctrinal approaches also indicate that the principle of the rule of law is a component of *Rechtsstaat*:

15 Shevchuk, 1998.

16 Rabinovych, 1997.

17 Koziubra, 2000.

18 Skrypniuk, 2000.

A state governed by the rule of law is one in which, with the aim of ensuring freedom and human dignity, the principles of the rule of law, the binding of state law by legal norms, guarantee the effective judicial protection of human rights. The rule of law is a dominant and unconditional legal imperative that extends to relations between the state, society, and citizens in all spheres of social life. It is meaningful for other legal principles of law-based state and is expressed in a special mode of activity of state bodies based on recognition of the priority of inalienable human rights and freedoms, their guarantee and protection, legal equality, legal certainty, ensuring access to independent justice.¹⁹

According to Professor V. Horodovenko, judge of the Constitutional Court of Ukraine, the simultaneous recognition of the principle of the law-based state and the rule of law in the Constitution can be safely called a phenomenon of the Ukrainian legal system, in the formation of which both Romano-Germanic (*Rechtsstaat*) and Anglo-Saxon (Rule of Law) legal traditions played a significant role. However, in more recent times, it is increasingly reported that the difference between them is terminological rather than substantive.²⁰

According to Professor A. Zayats, the principle of the rule of law has a sense only if law is understood not simply as a set of norms established by the state but as a set of proper rules, rules of behaviour (scale, measure), and a corpus of rules legitimized by society, based on the historically achieved level of social ethics. Hence, he concludes that such an understanding of law does not provide grounds for its identification with the law, and therefore makes it impossible to idealize the prescriptions of the state.²¹ According to this scholar, the principle of the rule of law finds its specification in the following components: 1) the principle of minimum sufficiency of legal regulation (the law should act only where other regulators are ineffective; ensure the formal equality of people and substantive equality within the limits in which the law is generally capable of realizing this equality, for example, a clause against discrimination; should apply to all homogeneous public relations; reflect the highest moral values of society, protect the rights of the minority; open up space for the free activity of citizens); 2) the principle of binding the state with the rights and freedoms of citizens (the rights and freedoms of a person and a citizen and their guarantees dominate the interests of the state, society, and the department; their 'paternalistic' interpretation is prohibited); 3) principles of non-partisanship of law, its relative independence in relation to political forces, and ideologizing of law (law restores its nature as a phenomenon much closer to morality, economy, and social relations than to politics, which by its influence on

19 Petryshyn, Lukianov, Maksymov, Smorodynskyi et al., 2020.

20 Horodovenko, 2018.

21 Zaiets, 1998.

law should not distort the essence, the primary basis of legal regulation of social relations); 4) the principle of relative independence of law in relation to judicial and executive authorities (executive and judicial authorities recognize the relative independence of law; they do not formally apply the law but, within certain limits, use legal ideals and legal ideas; the principle of the rule of law means not only the supremacy of its formal sources – Constitution and laws – but also the recognition of natural law as a direct regulator of social relations in the form of legal ideas of truth, justice, morality, equality, etc.); 5) the principle of the supremacy of the Constitution and laws of Ukraine (the supremacy of the Constitution over laws, laws over the decisions of executive authorities, and acts of the judiciary).²²

Such views of Ukrainian scientists do not consider the most important significance of the principle of the rule of law, which is widespread in Western legal science as a concept of limiting state power and fighting against arbitrariness. C. McIlwain, professor of public law, directly connected the principle of the rule of law with constitutionalism, by which he understands ‘legal limitation of the state and the complete opposite of arbitrary rule’.²³ Note that the legal limitation of the state, which refers to the activity of state bodies in a legal form and within the scope of competence, is an extremely important but not the main element of the principle of the rule of law. It should be borne in mind that absolute compliance with a legal act (law), regardless of its content, may lead to the identification of the principle of the rule of law with the principle of the rule of statute.²⁴ As for the opposite of arbitrary rule, or rule through the formulation and implementation of subjective state will, which violates the principles of reasonableness and justice, this definition makes a direct allusion to natural law as a source of constitutional law as opposed to state arbitrariness, the cases of which manifestations are potentially suggested by the theory of legal positivism.

As S. Holovaty points out, Ukrainian scientists and politicians cannot recognize an ideal element in law, as law is an abstract and ‘blurred’ category; therefore, the law itself is the main reference point for establishing law and order in the country. They recognize this approach as unpromising from the standpoint of forming a lean and effective legal system and defining clear guidelines in law enforcement, and equate the principle of the rule of law with the principle of the rule of law of all normative legal acts of the state, or only laws regarding all other legal acts of the state.²⁵

Based on the analysis of the views of domestic scientists on the principle of the rule of law, Professor M. Kozyubra enumerates four approaches to its understanding:

22 *Idem*, pp. 4–12.

23 McIlwain, 1940.

24 *Komentar do Konstytutsii Ukrainy*, 1996.

25 Holovaty, 2002.

1. Identification of the principle of the rule of law with the traditional for Soviet (and not only Soviet) legal theory and practice principle of the rule of law in its narrow meaning, that is, as an act of the legislative body (the most common approach).
2. As the supremacy of all normative legal acts.
3. As the actual identification of the supremacy of law with the supremacy of reason and justice, that is, with the categories that are mainly operated by the doctrine of natural law.
4. Rule of law means the priority of generally recognized principles and norms of international law over national legislation.²⁶

Professor S. Pogrebnyak recognizes that the formal aspect of the principle of the rule of law means that the state must act in accordance with the law and be subject to its effect, and the substantive aspect consists in the fact that there are well-defined standards that determine the essence of positive law. These standards are, first of all, basic human rights and principles of natural law.²⁷

It should be noted that these definitions of the rule of law principle and its content in the works of Ukrainian scholars have undergone significant evolutionary development over the past 30 years, after Ukraine gained independence and adopted the Constitution of Ukraine in 1996. It can now be argued that the understanding of the rule of law principle in Ukrainian academic circles has come closer to the documents of the Council of Europe and the EU regarding this principle mentioned in this article.

2.3. The ‘Gold Standard’ of the Rule of Law Principle: Contribution of the Venice Commission and Its Recognition by the Constitutional Court of Ukraine

In this connection, it should be noted that only now has the understanding of the principle of the rule of law in Ukraine come close to its true original meaning, formulated in the documents of the institutions of the Council of Europe and the EU (six elements of the rule of law principle in the Venice Commission Report on the Rule of Law of 2011).

The principle of the rule of law is enshrined in the first part of Article 8 of the Constitution of Ukraine. Therefore, Ukraine accorded this principle the highest legal importance in order for the normative legal acts of the state and practice of their application (judicial and administrative) to comply with this principle.

According to S. Holovaty, the constitutional formula containing the imperative to recognize the principle of the rule of law by the state is embodied in the actions

²⁶ Koziubra, 2004.

²⁷ Pohrebniak, 2006.

of the state when it assumed obligations under international law, when it joined the Charter of the Council of Europe and ratified the European Convention on the Protection of Human Rights and Fundamental Freedoms and placed this principle at the highest level – constitutional, forming the system of foundations of the constitutional system in Ukraine. Later, it was recognized in several ordinary Ukrainian laws, in particular and above all, in those related to the judiciary.²⁸

For example, according to Article 8 of the Code of Administrative Procedure of Ukraine dated 6 July 2005, the Court, when deciding a case, is guided by the principle of the rule of law, according to which, in particular, a person and their rights and freedoms are recognized as the highest values and determine the content and direction of the state's activities (the first part). The court applies the principle of the rule of law, taking into account the case-law of the European Court of Human Rights (second part).²⁹

The legal principle of the rule of law should be perceived as an integral principle of law, which in the course of its evolution, in addition to the principle of *nullum crimen sine lege* (as the first element of his doctrine) and the principle of equality of all before the law (the second element of his doctrine) – originally laid down by Albert Dicey in the 19th century –, later absorbed the well-known universal principles of law, which are currently its components, that is, its important principles (or its important elements). Among them are, in particular, the principles of people's rule (democracy), separation of powers, responsibility of the state and officials, legality, independence and impartiality of the court, access to court (with the right to a fair trial), respect for human rights and fundamental freedoms, non-discrimination, hierarchy of legal prescriptions, prohibition of retroactive effects of legal provisions, legal certainty, *res judicata*, proportionality, and others. The list of such principles is not exhaustive, primarily because the rule of law is a living and dynamic concept.³⁰

Therefore, the best understanding of the principle of the rule of law provides the definition of its constituent elements for accurate practical application. From this perspective, it is the most important document for the Ukrainian legal system – Report on the rule of law – adopted by the Venice Commission at its 86th plenary session on 25–26 March 2011,³¹ alongside The Rule of Law Checklist³² adopted by the Venice Commission at its 106th plenary session on 11–12 March 2016.

There are two important citations (definitions on the rule of law) in the Report on the rule of law (CDL-AD (2011)003rev-e) taken from writings of prominent legal scholars of the Anglo-Saxon world: Professor A. Dicey from the Victorian

28 Holovaty, 2024.

29 Verkhovna Rada of the Ukraine, no date.

30 Holovaty, 2024.

31 European Commission for Democracy through Law, 2011.

32 European Commission for Democracy through Law, 2016.

era and Lord T. Bingham. For A. Dicey, the rule of law had three core features: First, no person should be punished but for a breach of the law, which should be certain and prospective, so as to guide peoples' actions and transactions and not to permit them to be punished retrospectively; discretionary power would lead to arbitrariness. Second, no person should be above the law and that all classes should be equally subjected to the law. Third, the rule of law should not emanate from any written constitution but from the 'common (judge-made) law' (para 9).

For Lord T. Bingham, 'all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts' (para 36).

From this short definition by Lord Bingham, the Venice Commission came to the conclusion that the rule of law concept is expanded by eight 'ingredients': (1) Accessibility of the law (that it be intelligible, clear, and predictable); (2) questions of legal right should be normally decided by law and not discretion; (3) equality before the law; (4) power must be exercised lawfully, fairly, and reasonably; (5) human rights must be protected; (6) means must be provided to resolve disputes without undue cost or delay; (7) trials must be fair; (8) compliance by the state with its obligations in international law as well as in national law (para 37).

Considering these classical definitions of the rule of law and the relevant acts of international law, the leading documents of international organizations on this subject, including case-law of the ECHR, the Venice Commission came to the important conclusion on the six key elements of the rule of law concept – which are not only formal but also substantial – in paragraph 41 of the Report: (1) Legality, including a transparent, accountable, and democratic process for enacting law; (2) legal certainty; (3) prohibition of arbitrariness; (4) access to justice before independent and impartial courts, including judicial review of administrative acts; (5) respect for human rights; and (6) non-discrimination and equality before the law.

These two documents of the Venice Commission were recognized by the Constitutional Court of Ukraine as an authoritative source revealing the content of the constitutional principle of the rule of law for the purposes of practical application. This happened for the first time on 21 December 2017 in decision No. 3-p/2017 in the case of exclusion of candidates for people's deputies from the electoral list of a political party. As the Court noted,

[t]he party's exclusion of candidates for People's Deputies of Ukraine from the election list from the party after establishing the results of the elections of People's Deputies of Ukraine leads to an arbitrary change in the order of candidates for People's Deputies of Ukraine in the election list. Such an exclusion puts the party that formed the electoral list above the voters

and causes the direct dependence of the candidate for People's Deputies of Ukraine on the party. The existence of the possibility of excluding candidates for People's Deputies of Ukraine from the electoral list of the party after the results of the elections of People's Deputies of Ukraine also causes legal uncertainty regarding the acquisition by candidates for People's Deputies of Ukraine of the status of People's Deputies of Ukraine, which violates the principle of the rule of law enshrined in Article 8 of the Constitution of Ukraine.

According to the principle of legal certainty as one of the elements of the principle of the rule of law, limitations on the fundamental rights of a person and a citizen and the implementation of these restrictions in practice are permissible, in particular on the condition of ensuring the predictability of the application of legal norms that establish such limitations.

In the Report of the European Commission 'For Democracy through Law' (Venice Commission) on The Rule of Law, approved at its 86th plenary session held on 25–26 March 2011, it is noted that one of the components of the rule of law is legal certainty, which requires that the legal norms are clear and precise, aimed at ensuring the constant predictability of situations and legal relations that arise (paragraphs 41, 46).³³

In decision No. 1-p/2018 of 27 February 2018, in the case of taxation of pensions and lifelong maintenance, the Constitutional Court of Ukraine noted that in the Report 'The Rule of Law', which was approved by the European Commission 'For Democracy through Law' (Venice Commission) at the 86th plenary session (25–26 March 2011), it had been emphasized that the principle of legal certainty was key in the issue of trust in the judicial system and the rule of law; the state was obliged to observe and apply in a predictable and consistent manner the laws it had enacted (paragraph 44); legal certainty implied that legal norms had to be clear and precise, as well as aimed at ensuring constant predictability of situations and legal relations (paragraph 46); the parliament could not be allowed to disregard fundamental human rights by passing vague laws (clause 47); legal certainty also meant that it was necessary to generally comply with the obligations or promises that the state had made to the people (the concept of 'legitimate expectations') (paragraph 48); the principle of legal certainty required the clarity, comprehensibility, and unambiguity of legal norms and their predictability from the legislator to ensure a stable legal status of a person.

After the introduction of pension taxation into the legislation of Ukraine on 1 July 2014, within two years, the Verkhovna Rada of Ukraine made changes three times. Under such circumstances, persons entitled to pension payments could

33 Decision of the Constitutional Court of Ukraine, 21 December 2017, No. 3-p/2017.

objectively not be sure of their legitimate expectations regarding the stability of legal regulation in this area.

Therefore, the establishment by the Verkhovna Rada of Ukraine in the legislation of Ukraine on the taxation of pensions and changes in the amount from which such taxation begins contradicts such elements of the constitutional principle of the rule of law as legal certainty, legal predictability, legitimate expectations, and justice.³⁴

As for the application of the Rule of Law Checklist for the interpretation of the rule of law principle, the Decision of CCU (Second Senate) dated 18 June 2020, No. 5-p(II)/2020, is a good example:

The principle of legal certainty is essential in matters of trust in the judicial system in general and the effectiveness of the rule of law. One of the constituent elements of the general principle of legal certainty is the requirement (as a principle) of legal provisions' predictability. A constituent element of the general principle of legal certainty as a requirement of the rule of law is also the principle of legitimate expectations, which, according to the interpretation of the Venice Commission, 'It also expresses the idea that public authorities should not abide only by the law but also by their promises and raised expectations' (special report of the Venice Commission 'Rule of law Checklist', CDL-AD(2016)007e, point 5.61). (...) the emergence among a certain category of citizens (specifically prosecutors) of a feeling of the collapse of legitimate expectations, which is incompatible with the requirement of legal certainty as a constituent element of the principle of the rule of law. The Constitutional Court of Ukraine draws attention to the fact that the legislator's failure to observe the principle of legal certainty as a constituent element of the principle of the rule of law caused the unequal application of the provision (this law) by the courts.³⁵

Starting this year, the Constitutional Court begins to refer to both documents when reasoning decisions:

The requirement of legal certainty follows from the first part of Article 8 of the Constitution of Ukraine as an imperative of the rule of law ('the principle of the rule of law is recognized and effective in Ukraine'). 'Legal certainty also means that the state must generally honour the obligations it has assumed towards the people or fulfil what it has promised [the principle of "legitimate expectation"]' [Report on the rule of law, endorsed by the European Commission 'For Democracy through Law' (Venice Commission), CDL-AD(2011)003rev, § 48].

34 Decision of the Constitutional Court of Ukraine, 27 February 2018, No. 1-p/2018.

35 Decision of the Constitutional Court of Ukraine, 18 June 2020, No. 5-p(II)/2020.

A component of the principle of legal certainty as a requirement of the rule of law is the principle of legitimate expectations, which, according to the interpretation of the Venice Commission, expresses the idea that public authorities must comply not only with the provisions of legal acts but also with their promises and expectations awakened [in a person]; according to the doctrine of legitimate expectations, those who act in good faith on the basis of law as it is should not be frustrated in their legitimate expectations [Special Study of the Venice Commission ‘Rule of Law Check List’, CDL-AD(2016)007, point II.B .5.61].

In the context of this constitutional proceeding, legal certainty according to the doctrine of legitimate expectations should be understood as the right of a person to count not only on the stability of the provisions of legal acts but also on a clear understanding of the legal consequences of their application, as well as on the consistency of the legislator in matters of regulating social protection of persons who suffered as a result of the Chernobyl disaster, according to their legal status.³⁶

2.4. International and European Law in the Jurisprudence of the Constitutional Court of Ukraine

Since 2017, the Report on the Rule of law of the Venice Commission (CDL-AD(2011)003 rev-e) is the most authoritative document that defines the elements of the rule of law for the Constitutional Court of Ukraine. This is certainly a breakthrough moment, as the Court has previously mostly relied on the understanding of this principle in the monographs of post-Soviet scholars, who generally did not assign practical significance to the principle of the rule of law in its application and interpretation. Now, the interpretation of the Constitution of Ukraine has a value-oriented approach under the influence of ideas and principles originating from the Western legal tradition, as well as from international and European law. This also applies to the understanding of the content and elements of the principle of the rule of law.

In this aspect, the decision of the Constitutional Court in the case of judicial control over the hospitalization of incapacitated mentally ill persons from 1 June 2016, No. 2-пн/2016, gains relevance. In this case, the Court started to formulate the doctrine of a friendly attitude to international law:

The Constitutional Court of Ukraine takes into consideration the provisions of current international treaties, agreed to be binding as given by the Verkhovna Rada of Ukraine, and the practice of interpretation and application of these treaties by international bodies whose jurisdiction Ukraine has recognized, in particular the European Court of Human Rights. Since Article 29 of the Constitution of Ukraine corresponds to Article 5

36 Decision of the Constitutional Court of Ukraine, 20 March 2024, No. 2-p(II)/2024.

of the Convention, in accordance with the principle of friendly attitude to international law, the practice of interpretation and application of this Article of the Convention by the European Court of Human Rights should be taken into account when considering this case.³⁷

The significance of this doctrine lies in the fact that when the Constitutional Court applies constitutional norms on human rights, it considers the relevant practice of application and interpretation of the relevant norms of the European Convention by the European Court of Human Rights (in this case, regarding the right to liberty and personal security). It means that the practice of the European Court of Human Rights becomes a peculiar source of constitutional law in conditions where, according to the second part of Article 8 of the Basic Law, the Constitution has the highest legal force – it is superior to acts of international law. Therefore, the Court consistently develops this doctrine when acts of international and European law, including acts of soft law on human rights and case-law of the ECHR, are a source of interpretation of constitutional norms. For example, in this case, the Constitutional Court also referred to Article 5 of the European Convention on Human Rights, the decisions of the European Court of Human Rights: *Winterwerp v Netherlands* (1979); *McKay v United Kingdom* (2006); *Stork v Germany* (2005); *Stanev v Bulgaria* (2012); *Horshkov v Ukraine* (2005); the Resolution of the General Assembly of the United Nations ‘Principles of protection of persons with mental illnesses and improvement of psychiatric care’ of 18 February 1992, No. 46/119; the Recommendation on Psychiatry and Human Rights of the Parliamentary Assembly of the Council of Europe of 1 January 1994, No. 1235; the Recommendations of the Committee of Ministers of the Council of Europe regarding the legal protection of persons who suffer from mental disorders and are forcibly kept as patients, dated 22 February 1983, No. R(83)2.

Currently, the practice of referring to the decisions of the European Court of Human Rights is widespread in the activity of the Constitutional Court of Ukraine; it is mentioned in almost every decision related to a constitutional complaint, that is, where the issue of the application of constitutional norms on human rights is raised. As regards the acts of the EU, the most revealing is the decision of the Court in the case on guarantees of judicial control over the observance of the rights of persons detained in custody, dated 18 July 2024, No. 8-p(II)/2024. The Constitutional Court took into account Article 41, paragraph 2 of the Charter of Fundamental Rights of the EU of 2000, which includes ‘the right of every person to be heard, before any individual measure which would affect him or her adversely is taken’.³⁸

37 Decision of the Constitutional Court of Ukraine, 1 June 2016, No. 2-p(II)/2016.

38 Decision of the Constitutional Court of Ukraine, 18 July 2024, No. 8-p(II)/2024.

In addition to this Charter, the Court also referred to the International Covenant on Civil and Political Rights, European Convention on Human Rights, the decisions of the European Court of Human Rights: *Witold Litwa v Poland* (2000); *S., V., and A. v Denmark* (2018); *Brogan and Others v the United Kingdom* (1988); *Mooren v Germany* (2009); *McKay v the United Kingdom* (2006); *Buryaga v Ukraine* (2010); *Khudoyorov v Russia від* (2005); *Belozorov v Russia and Ukraine* (2015); the decisions of the Constitutional Court of Croatia, dated 20 December 2007; General Comment No. 35 on Article 9 of the International Covenant on Civil and Political Rights of the United Nations Human Rights Committee at its session of 7–31 October 2014; Recommendation Rec (2006)13 of the Committee of Ministers to Member States on the use of remand in custody, the conditions in which it takes place, and the provision of safeguards against abuse, 27 September 2006; Report – Respect for democracy, human rights, and the rule of law during states of emergency, the Venice Commission, dated 19 June 2020; General Comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial CCPR/C/GC/32, dated 23 August 2007; as well as Magna Carta 1215 and Habeas Corpus Act 1679, according to which a free person cannot be deprived of their liberty without a court decision, which must specify the grounds for detention.

This landmark decision of the CCU emphasizes the exceptional importance of applying acts of European law, in particular the Nice Charter of 2000, as a source of interpretation of constitutional provisions. With reference to this Charter, the Constitutional Court ‘discovered’ the fundamental right to be heard, which previously did not exist in the text of the Constitution of Ukraine in a written form.

This example of the use of various sources for the argumentation of the decisions of the constitutional court is given to understand the prospects of using acts of European law, including the decisions of the European Court of Justice, for the interpretation of constitutional provisions. They will be increasingly used by the Court in accordance with the doctrine of friendly attitude to international law, as Ukraine is a candidate for EU accession.

2.5. The Rule of Law Principle and Its Elements in the Jurisprudence of the Constitutional Court of Ukraine

The first decision where the Constitutional Court of Ukraine tried to reveal the content of the principle of the rule of law, dated 2 November 2004, No. 15-пн/2004, is as follows:

The rule of law is the supremacy of law in society. The rule of law requires the state to implement it in law-making and law-enforcement activities, in particular in laws, which in their content should be imbued primarily with ideas of social justice, freedom, equality, etc. One of the manifestations of

the rule of law is that the law is not limited to legislation as one of its forms but also covers other social regulators, including moral norms, traditions, customs, etc., which are legitimized by society and determined by the historically achieved cultural level of society. All these elements of law are united by a quality that corresponds to the ideology of justice, the idea of law, which is largely reflected in the Constitution of Ukraine.

This understanding of law does not provide grounds for identifying it with the statute, which can sometimes be unjust, including restricting the freedom and equality of a person. Justice is one of the basic principles of law, it is decisive in defining it as a regulator of social relations, one of the universal dimensions of law. Usually, justice is considered as a peculiarity of law, expressed, in particular, in the equal legal scale of behaviour and in the proportionality of legal responsibility to the offence committed.

The rule of law, being one of the basic principles of a democratic society, provides for judicial control over interference with every person's right to freedom.³⁹

Therefore, from the very beginning, the rule of law was perceived by the Constitutional Court as the superiority of law in society, which is fair and just and related to other social regulators such as morality. Even then, it was argued that law as a general notion cannot be equated with statutory law.

By 2019, the Court had already recognized the principle of the rule of law as a tool to fight against the arbitrariness of state power; in this sense, the principle of the rule of law coincided with the constitutionalism doctrine: 'The main purpose of the rule of law is, first of all, to limit the power of the state over a person, to ensure against arbitrary intervention of the state and its bodies in certain spheres of human activity'.⁴⁰

In early 2020, the Court provided a list of elements of the principle of the rule of law, most of which differ from the six principles of the Venice Commission's Rule of Law Report of 2011:

Taking into account the content of Article 8 of the Constitution of Ukraine, developing the practice of the Constitutional Court of Ukraine, the rule of law should be understood, in particular, as a mechanism for ensuring control over the use of power by the state and protecting people from arbitrary actions of state power. The rule of law as a normative ideal towards which every legal system should strive and as a universal and integral principle of law must be considered, including in the context of

39 Decision of the Constitutional Court of Ukraine and Dissenting Opinion, 2 November 2004, No. 15-p(II)2004.

40 Decision of the Constitutional Court of Ukraine (Grand Chamber), 20 June 2019, No. 6-p/2019.

its fundamental components such as the principle of legality, the principle of separation of powers, the principle of popular sovereignty, the principle of democracy, the principle of legal certainty, the principle of a fair trial. In this context, the rule of law means that public authorities cannot act arbitrarily and are obliged to follow rules that will make it possible to predict the measures that will be applied in specific legal relationships. On the basis of this, a person can predict and plan their actions and count on the expected result.⁴¹

Further, in its jurisprudence, the Court indicated elements or constituent parts of the principle of the rule of law: principle of legal certainty, proportionality, legal (reasonable) expectations, effectiveness of human rights, individualization of responsibility, and principle of *res judicata*.

In the following, quoted excerpts from the case-law of the Court for each principle relevant to the object of the inquiry at hand will be presented.

2.5.1. Principle of Legal Certainty

One of the elements of the rule of law is the principle of legal certainty, which states that the limitation of the basic rights of a person and a citizen and the implementation of these limitations in practice is permissible only under the condition of ensuring the predictability of the application of legal norms established by such limitations. That is, the limitation of any right should be based on criteria that will enable a person to separate lawful behaviour from illegal behaviour, to predict the legal consequences of their behaviour;⁴²

The Constitutional Court of Ukraine believes that the principle of legal certainty requires clarity, comprehensibility, and unequivocalness of legal norms, in particular their predictability and stability;⁴³

According to the principle of legal certainty as one of the elements of the principle of the rule of law, limitations on the fundamental rights of a person and a citizen and the implementation of these limitations in practice are permissible, in particular on the condition of ensuring the predictability of the application of legal norms that establish such limitations;⁴⁴

41 Decision of the Constitutional Court of Ukraine (Grand Chamber), 23 January 2020, No. 1-p/2020.

42 Decision of the Constitutional Court of Ukraine, 29 June 2010, No. 17-p(II)/2010.

43 Decision of the Grand Chamber of the Constitutional Court of Ukraine, 20 December 2017, No. 2p/2017.

44 Decision of the Grand Chamber of the Constitutional Court of Ukraine, 21 December 2017, No. 3-p/2017.

The Constitutional Court of Ukraine believes that the principle of legal certainty as one of the elements of the rule of law does not exclude the recognition of certain discretionary powers in decision-making by a public authority, but in such a case there should be a mechanism to prevent their abuse;⁴⁵

Legal certainty enables participants in social relations to foresee the consequences of their actions and to be confident in their legitimate expectations, in particular that the right acquired by them on the basis of current legislation will be implemented. Legal certainty is determined by the realization of legitimate expectations, that is, the achievement of the desired result by taking lawful actions, taking into account the probable consequences foreseen in advance. The realization of legitimate expectations becomes impossible, in particular in the case when a person cannot achieve the predicted result due to a change in legal regulation in such terms that are not reasonable and justified;⁴⁶

The Constitutional Court of Ukraine proceeds from the fact that the principle of legal certainty as a component of the constitutional principle of the rule of law is a set of requirements for the organization and functioning of the legal system, law-making processes, and law enforcement in a way that would ensure the stability of the legal status of a person. This can be achieved only by legislatively consolidated high-quality, clear norms;⁴⁷

(...) legal certainty ensures the adaptation of the subject of law enforcement to the normative conditions of legal reality and their confidence in their legal status, as well as protection against arbitrary interference by the state in the sphere of their rights. Legal certainty must be understood through its following components: clarity, comprehensibility, unambiguity of legal norms; the right of a person in their actions to rely on the reasonable and predictable stability of existing legislation and the ability to foresee the consequences of the application of legal norms (legitimate expectations). Thus, legal certainty implies that the legislator should strive for clarity and comprehensibility in the drafting of legal norms. Each person, depending on the circumstances, should be able to determine which legal norm applies in a particular case and have a clear understanding of the occurrence of

45 Decision of the Grand Chamber of the Constitutional Court of Ukraine, 11 October 2018, No. 7-p/2018.

46 Decision of the Constitutional Court of Ukraine (First Senate), 5 June 2019, No. 3-p(I)/2019.

47 Decision of the Constitutional Court of Ukraine (Grand Chamber), 6 June 2019, No. 3-p/2019.

specific legal consequences in the relevant legal relationship, taking into account the reasonable and predictable stability of legal norms;⁴⁸

On the basis of these considerations, the Constitutional Court of Ukraine believes that excessive formalism in the requirements for the textual presentation of individual provisions of the Code or other act of civil legislation with the aim, in particular, of narrowing the content and scope of evaluative concepts characteristic of private law or reducing the role of the court in evaluating facts and interpreting and the application of legal provisions ceases to serve the purpose of ensuring legal certainty and diminishes the importance of justice in a state governed by law;⁴⁹

In this context, the Constitutional Court of Ukraine notes that the requirement of legal certainty as a constituent element of the ‘rule of law’ refers to the quality of legal acts and their provisions, and not to the ‘situation’. Legal certainty of any normative act (or its separate provision) cannot be achieved if the text of the act (its provision) is ambiguous (multiple). A special role in this area belongs to the state language. Legal certainty is, above all, unambiguity. Unambiguity is most fully achieved in a homogeneous linguistic environment. Precepts of national law (constitution, laws, by-laws, etc.) are connected by a common professional (legal) terminology, as well as background knowledge of legally significant words and expressions. Such background knowledge is an inseparable part of the linguistic competence of speakers of the Ukrainian language; therefore, it is owing to its application as a single state language that it is possible to present the will of the national norm-maker, in particular the legislator, in its authentic expression. This is one of the most important factors in the functioning of the Ukrainian language as a state language, ensuring which is the legitimate goal of the Law;⁵⁰

(...) from the content of Article 8 of the Basic Law of Ukraine, based on its prescriptions of the legal positions of the Constitutional Court of Ukraine, as well as international acts, which set out the understanding of legal certainty, it can be seen that the principle of the rule of law requires the legislator to establish a clear, understandable, unambiguous, predictable legal regulation of public relations to ensure a stable legal status of a person,

48 Decision of the Constitutional Court of Ukraine (Grand Chamber), 23 January 2020, No. 1-p/2020.

49 Decision of the Constitutional Court of Ukraine (Second Senate), 28 April 2021, No.2-p(II)/2021.

50 Decision of the Constitutional Court of Ukraine, 14 July 2021, No. 1-p/2021.

to prevent arbitrarily abandoning the obligations assumed by the state, to guarantee proper protection of legitimate expectations of a person;⁵¹

The Constitutional Court of Ukraine believes that unequal legal regulation of the procedure for dismissing prosecutors from their positions during their temporary incapacity has been allowed at the legislative level, which does not meet the requirement of legal certainty as a component of the principle of the rule of law and therefore contradicts the first part of Article 8 of the Constitution of Ukraine;⁵²

(...) the Constitutional Court of Ukraine emphasizes the need to observe legal certainty as a requirement of the rule of law in matters of ensuring funding and proper conditions for the functioning of courts and the activities of judges. Establishing the amount of a judge's remuneration by the law on the judiciary means not only the guarantee of its amount at the level of a special law but also the existence of one such law that clearly, systematically, and consistently regulates the issue of the amount of a judge's remuneration in accordance with the unified status of judges and guarantees of independence and inviolability of judges;⁵³

2.5.2. Principle of Proportionality

One of the elements of the rule of law is the principle of proportionality, which in the field of social protection means, in particular, that the measures provided for in normative legal acts must be aimed at achieving a legitimate goal and must be commensurate with it;⁵⁴

Resolving the issue of compliance of articles 96-1, 96-2 of the Criminal Code of Ukraine with Article 8 of the Constitution of Ukraine, the Constitutional Court of Ukraine proceeds from the fact that the principle of proportionality in the field of criminal law is manifested in particular in the fact that the applied types of punishment and (or) other measures of a criminal legal nature must be proportional. This requirement is general; it applies to all cases of application of types of punishment, other criminal-legal measures, including special confiscation. Therefore, the principle of proportionality obliges the court to appropriately apply types of punishment and (or) other measures of a criminal law nature in each specific case, taking into

51 Decision of the Constitutional Court of Ukraine, 13 September 2023, No. 7-p(I)/2023.

52 Decision of the Constitutional Court of Ukraine (First Senate), 2 October 2024, No. 9-p(I)/2024.

53 Decision of the Constitutional Court of Ukraine, 26 March 2024, No. 3-p(II)/2024.

54 Decision of the Constitutional Court of Ukraine, 25 January 2012, No. 3-p(II)/2012.

account the severity of the committed criminal offence and a number of other facts and circumstances. To ensure the effectiveness and efficiency of the guarantees provided by the Basic Law of Ukraine and to prevent the violation of the constitutional rights of all participants in criminal procedural relations, the state, guided by the law and the principle of respect for human rights, is obliged to organize the criminal justice system accordingly;⁵⁵

The state's ensuring of adequate guarantees against the illegal dismissal of a prosecutor whose activities are related to the functioning of the justice system is not only an element of the prosecutor's status but also one of the prerequisites for the realization of the constitutional right to judicial protection. Therefore, the dismissal of any prosecutor is possible only in the manner and on the grounds determined by the law, the norms of which must meet the requirements of the rule of law, must be aimed at achieving a legitimate goal, and the means used during the dismissal must be proportional;⁵⁶

An important component of the rule of law is the principle of proportionality. The Constitutional Court of Ukraine proceeds from the fact that the principle of proportionality is applied in particular when determining the appropriateness of the measure of legal responsibility imposed on a person, the nature and content of the offence committed by them. Therefore, the implementation of the constitutional requirement regarding the individualization of legal responsibility is possible if the principle of proportionality is observed in the procedure of bringing the violator to legal responsibility. The Constitutional Court of Ukraine believes that the disputed legal provisions, which establishes a non-alternative sanction that has the characteristics of being absolutely determined, does not ensure proportionality and individualization of the legal responsibility of the violator of the legislation on the safety of non-food goods and products, taking into account all the significant circumstances of the case. In view of the above, the Constitutional Court of Ukraine concludes that the contested provision contradicts the first part of Article 8, part of the second article 61 of the Constitution of Ukraine;⁵⁷

55 Decision of the Grand Chamber of the Constitutional Court of Ukraine, 30 June 2022, No. 1-p/2022.

56 Decision of the Constitutional Court of Ukraine, 1 March 2023, No. 1-p(II)/2023.

57 Decision of the Constitutional Court of Ukraine, 1 November 2023, No. 9-p(II)/2023.

2.5.3. Principle of Legal (Reasonable) Expectations

The Constitutional Court of Ukraine emphasizes that during the legal regulation of social relations related to the implementation, in particular, of social policy, in connection with the enactment of new laws or the introduction of changes to existing ones, state authorities, individuals should be given the opportunity to adapt to the new legal situation, that their legal expectations are protected. Thus, legal expectations as a component of the principle of the rule of law is one of the main criteria for the constitutional assessment of legal norms;⁵⁸

The Constitutional Court of Ukraine emphasizes that the principle of the rule of law provides for the introduction of legislative changes with the definition of a certain transition period (a reasonable time interval between the official promulgation of the law and its entry into force), which will give individuals time to adapt to new circumstances. The duration of the transition period when changing the legal regulation of social relations must be determined by the legislator in each specific situation, taking into account the following criteria: the purpose of the law within the legal system and the nature of the social relations regulated thereby; the circle of persons to whom the law will apply and their ability to prepare for its new provisions before they enter into force; other important circumstances, including those determining the time required for such law to enter into force;⁵⁹

2.5.4. Principle of Effectiveness of Human Rights (Judicial Protection)

In accordance with the principle of the rule of law, the state should introduce such a procedure for appellate review of cases that would ensure the effectiveness of the right to judicial protection at this stage of the court proceedings, in particular would provide an opportunity to restore violated rights and freedoms and to maximally prevent negative individual consequences of a possible judicial error;⁶⁰

(...) legal provisions, which make it impossible to review a court decision upon a person's application in connection with the adoption by the European Court of Human Rights of a decision in which a violation of the Convention has been established, after the expiry of a ten-year period

58 Decision of the Constitutional Court of Ukraine (Grand Chamber), 20 June 2019, No. 6-p/2019.

59 Decision of the Grand Chamber of the Constitutional Court of Ukraine, 22 May 2018, No. 5-p/2018.

60 Decision of the Grand Chamber of the Constitutional Court, 23 November 2018, No. 10- p/2018.

from the date of entry into force of the national court's decision, and the impossibility of renewing such a period by the court do not ensure the effective implementation of the constitutional rights of a person to judicial protection and to apply after using all national means of legal protection for the protection of their rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organizations of which they are a member or participant in Ukraine, therefore they contradict the requirements of part one of Article 8;⁶¹

Judicial control, the purpose of which is to ensure the timely defence and protection of the rights and freedoms of a person and a citizen, at the stage of enforcement proceedings, in addition to the resolution of a number of procedural issues by the court, also includes control during which the legality of the actions of the enforcement officer and the decisions made by him are assessed, i.e. it is aimed at preventing abuses by a state law enforcement or other official of a state enforcement service body or a private executive. The lack of appropriate and effective national legal mechanisms defined at the legislative level, which are founded on the basic principles of judicial procedure and are capable of providing judicial protection, restoration of the violated rights and freedoms of each person, may lead to the failure of the state to fulfil the positive obligation to execute the court decision (as an inseparable component of the right of everyone for judicial protection) in view of the complication or impossibility of such a process, the binding nature of court decisions that have entered into legal force, which will cause a violation of a person's right to access to court, reduce the effectiveness of judicial proceedings, which is incompatible with the principle of the rule of law;⁶²

The Constitutional Court of Ukraine notes that from the principle of the rule of law and the requirement to affirm and ensure a person's right to judicial protection in administrative proceedings, the state's obligation to ensure the mandatory execution of a court decision passed in favour of a person for the real protection and restoration of their rights and freedoms, follows interests that have been violated as a result of decision-making, actions or inaction by public authorities, their officials. The failure of the state to fulfil this duty leads to a violation of the right of a person to judicial protection, undermines the effectiveness of administrative proceedings, and therefore is incompatible with the principle of the rule of law, which

61 Decision of the Constitutional Court of Ukraine, 14 February 2024, No. 1-r(II)/2024.

62 Decision of the Constitutional Court of Ukraine, 13 May 2024, No. 6-p(II)/2024.

is established by the first paragraph of Article 8 of the Constitution of Ukraine;⁶³

2.5.5. Principle of Individualization of Responsibility

The Constitutional Court of Ukraine believes that in order to achieve a legitimate aim, the court must have discretion. However, when considering a case of violation of customs rules, the court cannot ensure the individualization of responsibility due to: the absence of other types of penalties in the specified Article of the Code; the impossibility of modifying the amount of interest according to which the fine is determined and the mandatory application of confiscation. The impossibility of choosing the type and size of the administrative sanction taking into account the circumstances of the case – namely: the nature of the committed illegal act, the form of guilt, the characteristics of the person, the possibility of compensation for the damage caused, the presence of circumstances that mitigate or aggravate responsibility – makes it impossible for the court to consider the case fairly. Such legislative regulation contradicts the principles of a democratic society based on the rule of law;⁶⁴

2.5.6. Principle of *Res Judicata*

The Constitutional Court of Ukraine proceeds from the fact that the observance of the principle of the finality of a court decision (*res judicata*) is of paramount importance to ensure respect for the court, its decisions, and the effectiveness of the entire justice system in a state governed by the rule of law.⁶⁵

3. Conclusions

On 24 February 2022, Russia started full scale war against Ukraine with the purpose of destroying the country as an independent, Western-oriented state, founded on the constitutional values of freedom, democracy, and the rule of law, trying to erase any mention of the fact that the Ukrainian people have a European identity and desire to join the EU, which is reflected in the Preamble to our Constitution. On 28 February 2022, five days after Russia's invasion, Ukraine submitted its application for EU membership. Now, the negotiations for EU accession are at the

63 Decision of the Constitutional Court of Ukraine, 1 March 2023, No. 2-p(II)/2023.

64 Decision of the Constitutional Court of Ukraine, 5 July 2023, No. 5-p(II)/2023.

65 Decision of the Constitutional Court of Ukraine, 22 November 2023, No. 10-p(II)/2023.

starting point. It is still difficult to determine what the requirements of the EU will be in the sphere of the rule of law for Ukraine during the negotiations process and what the main sources are for defining a rule of law standard that would be used by EU institutions. In the 2023 Communication on EU Enlargement policy, the Ukraine Report (SWD(2023) 699), the Commission mentioned seven steps – ‘mainly in the rule of law area’ – as necessary prerequisites to open negotiations.

The first step constitutes the introduction of a pre-selection process for prospective Constitutional Court judges on the basis of integrity and professionalism criteria on competition, in line with the Venice Commission recommendations with the leading role of internationally nominated members of the pre-selection body – the Advisory Group of Experts was already set up. Two new judges were nominated according to the new procedure this year and started to work at the Constitutional Court of Ukraine. The other six steps were also completed.

It is possible to make preliminary conclusions or assumptions regarding the documents of both the European Commission (Communications from the Commission to the European Parliament, the European Council, and the Council on the rule of law (COM/2014/0158 final and COM/2019/163 final)) and the Venice Commission (Report on the Rule of Law of 2011 and The Rule of Law Checklist of 2016) for defining the meaning and content of the rule of law principle.

Meanwhile, the practice of the Constitutional Court and other courts in Ukraine in determining the meaning and elements of this principle for its practical application is developing rapidly. This is greatly facilitated by the development of the doctrine (official and scientific) after the changes to the Constitution of 7 February 2019 regarding the European choice of Ukraine, the European identity of the Ukrainian people, and the transition from understanding the principle of the rule of law as an abstract philosophical category or as the rule of laws to a constitutional value of a fundamental level that has practical significance for Ukrainian judiciary.

In addition to the constitutional provisions (Article 8 of the Constitution of Ukraine) and the practice of their interpretation by the Constitutional Court, the documents of the European Commission and the Venice Commission regarding the meaning and constituent elements of the rule of law become a veritable beacon on Ukraine’s path to membership in the EU as a union, which is based on the fundamental values reflected in Article 2 of the TEU.

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