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## STOSOWANIE ZASADY PRAWORZĄDNOŚCI PRZEZ SĄDY MIĘDZYNARODOWE I KRAJOWE

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**Adnotacja.** W artykule omówiono specyfikę stosowania zasady praworządności przez sądy międzynarodowe i krajowe. Ustalono, że koncepcja demokratycznego państwa prawnego w Ukrainie pozostaje głównym tematem badawczym wśród krajowych naukowców – filozofów, socjologów, prawników, politologów, menedżerów itp., a także do wprowadzenia jej głównych idei przez władze publiczne, biorąc pod uwagę pozytywne doświadczenia innych krajów. Podkreślono, że powstanie takiego modelu państwa, który funkcjonowałby na zasadach praworządności – jest zjawiskiem złożonym i długotrwałym, wymagającym systemowych, spójnych, merytorycznie jakościowych modernizacji polityczno-prawnych, społeczno-ekonomicznych, duchowo-kulturowych. Należy zauważyć, że analiza orzeczeń Europejskiego Trybunału Praw Człowieka, Sądu Konstytucyjnego Ukrainy i Sądu Najwyższego wskazuje, że na obecnym etapie sędziowie aktywnie stosują w praktyce zasadę praworządności. Określono obiecujące kierunki teorii i praktyki prawnej w zapewnianiu zasady praworządności.

**Słowa kluczowe:** zasada praworządności, legalność, organy władzy sądowniczej, sprawiedliwość, Europejski Trybunał Praw Człowieka, Sąd Konstytucyjny Ukrainy, Sąd Najwyższy.

## APPLICATION OF THE PRINCIPLE OF THE RULE OF LAW INTERNATIONAL AND NATIONAL COURTS

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**Abstract.** The article considers the peculiarities of applying the principle of the rule of law by international and national courts. It is determined that the concept of a democratic state governed by the rule of law in Ukraine remains a leading research topic among domestic scientists – philosophers, sociologists, jurists, political scientists, managers, etc., as well as for its implementation by public authorities, taking into account the positive experience of other countries. It is emphasised that forming such a model of the state, which would function based on the rule of law – is a complex and long-term phenomenon. It is emphasised that the analysis of the decisions of the ECHR, the Constitutional Court of Ukraine and the Supreme Court shows that, at present, judges are actively applying the principle of the rule of law in practice. Perspective directions in ensuring the principle of the rule of law are identified.

**Key words:** the principle of law, legality, judiciary, justice, European Court of Human Rights, Constitutional Court of Ukraine, Supreme Court.

## ЗАСТОСУВАННЯ ПРИНЦИПУ ВЕРХОВЕНСТВА ПРАВА МІЖНАРОДНИМИ ТА НАЦІОНАЛЬНИМИ СУДАМИ

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**Анотація.** У статті розглянуто особливості застосування принципу верховенства права міжнародними та національними судами. Визначено, що концепція правової демократичної держави в Україні залишається провідною дослідницькою темою серед вітчизняних науковців – філософів, соціологів, правознавців, політологів, управлінців та ін., а також для впровадження її основних ідей органами публічної влади, враховуючи позитивний досвід інших країн. Акцентовано, що формування такої моделі держави, яка б функціонувала на засадах верховенства права – явище складне та довготривале, що потребує системних, послідовних, змістовно якісних політико-правових, соціально-економічних, духовно-культурних модернізацій. Наголошено, що аналіз рішень ЄСПЛ, КСУ та ВС свідчить про те, що на сучасному етапі судді активно застосовують у практиці принцип верховенства права. Визначено перспективні напрями для юридичної теорії та практики у забезпеченні принципу верховенства права.

**Ключові слова:** принцип верховенства права, законність, органи судової влади, справедливість, Європейський суд з прав людини, Конституційний Суд України, Верховний Суд.

**Formulation of the problem.** The functioning of modern democracies is based on the principles of law, the primary role of which undoubtedly plays the principle of the rule of law. The priority component of legal transformations is to ensure the activities of public authorities and local governments are in accordance with the rule of law. After all, the high level of its integration into state activities affects the state of ensuring human rights, freedoms and legitimate interests, fair justice, overcoming corruption and so on. All these and many other indicators, in general, determine the state of development of democracy in the state. However, forming such a state model is a complex and long-term phenomenon that requires systematic, gradual, meaningful modernisation of political, legal, socio-economic, and cultural nature.

A significant problem in this area is the periodic imitation by government institutions of applying this principle and its functioning in accordance with its requirements. Therefore, the study of the rule of law, which underlies the concept of the rule of law in Ukraine and, among other things, is provided by the judiciary, remains one of the most relevant topics for researchers in philosophy, sociology, and law and more.

**The state of elaboration of the problem.** The rule of law has been studied in the works of many domestic scholars in various fields: the rule of law in the legal systems of the world, the conceptual foundations of the rule of law, the implementation of the rule of law in various fields of law, ways to improve the rule of law in Ukraine and many etc. The fundamental contribution to the study of multiple aspects of the principle of the rule of law was made by such lawyers as T. Bagriy, Y. Bytyak, S. Bobrovnyk, J. Waldron, P. Gauder, S. Golovaty, R. Dvorkin, V. Campo, M. Kelman, M. Kozyubra, A. Kolodiy, V. Kopeychikov, O. Kopylenko, V. Kostytsky, M. Kostytsky, V. Kravchenko, V. Pogorilko, S. Pogrebnyak, D. Savenko, M. Sambor, A. Selivanov, S. Seryogin, V. Sirenko, Y. Todyka, M. Tsvik, O. Uvarova, S. Shevchuk, Yu. Shemshuchenko and others. Despite the highly close attention of researchers to this topic, the issue of the rule of law over time only becomes more relevant and promising for research, which is certainly justified by the current global crisis and local problems inherent in different countries.

Let's talk about the democratic vector of development of the Ukrainian state. Implementing the rule of law in public authorities and cooperation with a civil society based on the rule of law is now of paramount importance. It, therefore, requires further comprehensive consideration, including applying the rule of rights in the practice of national and international judges. The principle of the rule of law in judicial practice was studied by V. Averyanov, Y. Baulin, T. Bingham, L. Bogachova, I. Galashin, V. Gorodovenko, A. Grubinko, V. Klyuchkovich, M. Kozyubra, A. Korshun, V. Lemak, K. Lisetska, O. Makarenkov, J. Melnyk-Tomenko, I. Novitsky, O. Petryshyn, N. Pisarenko, P. Rabinovych and others. Given the leading role of the judiciary in ensuring human rights, the study of this area is especially relevant at the present stage of the development of the Ukrainian state.

**The purpose of the article.** The article aims to determine the peculiarities of applying the principle of the rule of law in international and national judicial practice and to identify areas for improving the implementation of this principle by Ukrainian courts.

**Presenting main material.** The idea of the rule of law originated in the works of Plato, Aristotle, Socrates, Cicero, and others – whose philosophical views became the basis for its modern formation as a fundamental principle of law.

In contrast to lawlessness, thinkers sought to give advice on the management of the policy in such a way that the justice and happiness of the people were fundamental in building social relations. The unity of views of ancient philosophers is determined by the fact that the basis of a happy life for citizens is the rule of reasonable laws, the main principle of which is justice (Шевченко, 2020: 8). Historians of law characterise the Middle Ages as a period in which the basis for the functioning of the state was a compromise between the king and the people, according to which the king undertook not to allow lawlessness.

XVIII–XIX centuries were marked by the emergence in the European cultural and legal space of the rule of law as a principle that has spread and continues to be integrated into the legal systems of different countries and rooted in the socio-political processes of states. Today, for every democratic, social, and legal state, the principle of the rule of law is a fundamental component of its functioning. This principle plays a particularly important role in forming relations: the state-society – citizen. Quite often, the judiciary ensures this model's effectiveness and fairness.

The modern understanding of the concept of “the rule of law” was introduced by the British constitutionalist Albert Venn Daisy in his work “Introduction to the doctrine of the law of the constitution” (1885). The scientist believed that there were two principles inherent in the British Constitution. The first basic principle is the sovereignty (supremacy) of the parliament (thus, the notion of representative power as the main characteristic of a democratic state was enshrined). The second principle that restrained the first (but in the context of the United Kingdom could not prevail over the first) was the rule of law (Європейська комісія «За демократію через право», 2011; Beschastnyi, Shkliar, Fomenko, Obushenko, Nalyvaiko, 2019). Among many other thinkers, a vital contribution to the modern understanding of the concept of the rule of law was made by the founder of the doctrine of the rule of law, Immanuel Kant.

Later, the concept of “the rule of law” was reflected in many doctrinal sources and regulations, including international human rights instruments, including the Convention for the Protection of Human Rights and Fundamental Freedoms.

In conditions of high dynamics of society, there are new principles of life, which must be subject to legal regulation and be regulated by the rule of law (Богачова, Сліпачик, Никонюк, 2021: 25; Bobrovnyk, Didych, Shevchenko, 2019). According to T. Bingham, the core of the rule of law is that all persons (both public and private) and government in the state should be bound by laws that are openly proclaimed, future-oriented and applicable in the courts (Писаренко, 2019: 58). It is important to emphasise that the concept of “the rule of law” has various interpretations. But it should be distinguished from a purely formal concept, according to which any action of a public official authorised by law must meet the requirements of the law. Over time, the essence of the rule of law in some countries has been distorted to such an extent that it is presented either as the equivalent of “the rule of law” or “rule of law” or even “law as a set of rules”. Such interpretations made possible authoritarian actions on the part of the authorities, and such interpretations do not reflect the modern essence of the rule of law (Головатий, 2006: 121). After all, the principle of the rule of law is a phenomenon that includes many different components. The leading role belongs to the Constitution (the rule of the Constitution), which ensures modern law and order.

Ensuring the rule of law The Constitution is one of the fundamental components of the rule of law and its effective integration into all spheres of state functioning. Having passed a long historical path of origin and development, the formation of a modern understanding of the principle of the rule of law in the legal science of Ukraine began after the adoption of the Basic Law of 1996 and the regulation of Art. 8, which states: the principle of the rule of law is recognised and operates in Ukraine.

For the national legal system of Ukraine, the principle of the rule of law is inseparable from the Constitution of Ukraine. This explains why the specification of the principle of the rule of law in Art. 8 of the Constitution is to proclaim the supreme legal force of the Constitution and to characterise its norms as having direct effect. Given the above, the verification of any norms or actions on their compliance with human rights is carried out by their comparative analysis with the provisions of the Constitution, and the direct effect of constitutional norms is the basis of the most accessible to citizens judicial protection of their violated rights (Хаустова, 2013; Ivani, Kuchuk, Orlova, 2020). Today, courts at various levels actively apply the rule of law in practice. In this regard, it is important to refer to the European Court of Human Rights (ECtHR) case law and national case law.

The analysis of the CAS of Ukraine shows that the principle of the rule of law is a set of guidelines and requirements for administrative proceedings. The European Court of Human Rights formulated these rules and requirements, including the principle of access to justice, legality, legal certainty, prohibition of arbitrariness, respect for human rights, non-discrimination and equality before the law and the courts etc. As J. Melnyk-Tomenko rightly points out, the principle of the rule of law is not limited to the above requirements and characteristics as the European Court of Human Rights in resolving specific cases (including in Ukraine) systematically enriches its importance with new permanent features and conditions of compliance (Мельник-Томенко, 2019: 88; Козинець, Мишаста, 2021: 238).

Thus, in the decision of the European Court of Human Rights in *Shchokin v. Ukraine* on 3 October 2013, the principle of the rule of law was considered in the context of the quality of legislation that proportionally affects the state of human and civil rights and freedoms. The decision states that the rule of law, one of the fundamental principles of a democratic society, is inherent in all articles of the Convention (art. 50); how national legislation is interpreted and applied must correspond to the “quality of the law”, requiring it to be accessible to interested parties,

clear and predictable in its application (paragraph 51); the lack of the necessary clarity and precision in national law, which provided for different interpretations..., violates the “quality of law” requirement of the Convention and does not provide adequate protection against arbitrary interference by public authorities with the applicant’s property rights (para. 56) (Рішення ЄСПЛ у справі «Щокін проти України», 2013).

Paragraph 55 of the judgment of the European Court of Human Rights in *Class and Others v. Germany* of 6 September 1978 states that the rule of law implies, among other things, that interference by the executive in human rights must be subject to effective supervision which the judiciary should provide. At the very least, judicial oversight should best ensure independence, impartiality and due process. The Court considers that in an area that provides, in some cases, such great opportunities for abuse that could have detrimental consequences for a democratic society as a whole, in principle, it is appropriate to entrust the supervisory function to judges (paragraph 56 § 2). The same thesis is stated in the decision in the case of *Volokh v. Ukraine*. In *Brown and Others v. The United Kingdom* and *Altai v. Turkey*, the Court noted that, by the rule of law, judicial review of the government is one of the fundamental principles of a democratic society (Ухвала, 2022). Thus, the European Court of Human Rights, considering cases and applying the principle of the rule of law, pays significant attention to control to express the principle under study. The rule of law, democracy and human rights are the elements that laid the foundation for the Council of Europe and are now effectively defended, including the rights and freedoms of many people, through the European Court of Human Rights.

It should be noted that the principle of the rule of law is one of the most frequently mentioned legal phenomena in the practice of the Constitutional Court of Ukraine. Thus, in the decision of November 2 № 15-rp/2004 in the case of a milder sentence imposed by the court, it was emphasised that the rule of law is the rule 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 permeated primarily by the ideas of social justice, freedom, equality, etc. (Рішення КСУ, 2004). In the decision of March 2, 2015 № 213-VIII, it is determined that, given the content of Art. 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 to ensure control over the use of state power and protect people from arbitrary actions of state power. The rule of law as a normative ideal and as a universal and integral principle of law must be considered, including in the context of its fundamental components, such as the principle of legality, the principle of separation of powers, the principle of people’s sovereignty, the principle of democracy, the principle of legal certainty (Рішення КСУ, 2015). Therefore, the principle of the rule of law is the primary system-forming phenomenon that unites the fundamental principles according to which the modern rule of law must function.

In another judgment in its constitutional complaint of 18 June 2020 № 213-VIII, the Court emphasised that the rule of law (law) as an integral part of the value system underlying modern European law is one of the triad of principles of the common heritage of European nations. nations along with its components such as true democracy and human rights. <...> The Ukrainian formula of rule of law as the basis of the national constitutional order is twofold: according to the first component “the rule of law in Ukraine is recognized”, according to the second – “the rule of law in Ukraine acts” (Рішення КСУ, 2020). It is worth noting that this is one of the first decisions of the Constitutional Court of Ukraine, where, along with the concept of the rule of law, the term “the rule of law” is used as its analogue. This innovation was introduced as a legal term by S. Holovaty (now a judge of the CCU) in his fundamental monographic study “The Rule of Law: in 3 books” (2006). And if the need for the term “the rule of law” was first debated, its use in judicial practice is now evidence of the adoption of this term by the scientific community and the authorities (Наливайко, Чепік-Трегубенко, 2020).

As for the activities of the Supreme Court and other courts of the judiciary in Ukraine, the following example should be given. The Supreme Court ruling of May 16, 2018, contains a legal position on the protection of bona fide mortgagees: “Good faith (paragraph 6 of Article 3 of the Civil Code) is a certain standard of conduct characterised by honesty, openness and respect for the interests of the other party The bank, as a bona fide mortgagee, who relied on the data of the register of real estate rights, that PERSON\_9 was the sole owner of a residential building, and therefore entered into a mortgage agreement. In such a situation, the refusal to satisfy the claim for foreclosure on the mortgage is contrary to the protection of the interests of a bona fide mortgagee” (Постанова ВСУ, 2018). Therefore, in the given legal position of the court, good faith is considered an element of the principle of the rule of law.

The rule of law is a dynamic phenomenon modified under the influence of new social ideas. At the same time, legal standards in human rights and freedoms are being updated. International and national courts significantly contribute in this direction, applying the rule of law. The rule of law is an interaction model between society and the state.

**Conclusions.** Thus, summing up, it should be noted the following.

1. The concept of a democratic state governed by the rule of law in Ukraine remains a leading research topic among domestic scholars – philosophers, sociologists, jurists, political scientists, managers, etc., as well as for the implementation of its central ideas by public authorities, taking into account the positive experience of other countries. In the system of general principles of law, the principle of the rule of law has a leading, integral, system-forming significance for the development of the rule of law and civil society. The study of the genesis of the rule of law in the global sense gives grounds to talk about the origin of his ideas in antiquity (the basic concepts of this period remain relevant today for the world). Still, in Ukraine, it began to take shape since independence after the Basic Law. It became a critical stage in determining the vector of development of our state. Further doctrinal development of the rule of law to effectively implement it in various spheres of state activity is a priority in scientific

and practical areas of today, among such sites – mechanisms for effective implementation of the rule of law in all spheres of state and public activity. Forms and methods of implementing the principle of the rule of law create a lack of stability in state-building, law-making and law enforcement processes.

2. The formation of such a state model, which would function based on the rule of law – is a complex and long-term phenomenon that requires systematic, consistent, meaningful political and legal, socio-economic, spiritual and cultural modernisation. In this context, the rule of law should, above all, be seen as a way of interaction between man, civil society and the state. The rule of law is a dynamic phenomenon; filled with ideas of justice, virtue, reasonableness, and equality before the law. In the system of general principles of law, the principle of the rule of law has a leading, integral, system-forming significance for the development of the rule of law and civil society. The use of the rule of law in the practice of international and national courts aims to promote human rights and freedoms, which also plays a vital role in ensuring public confidence in the courts.

3. The principle of the rule of law is the fundamental basis of the legal (in particular, judicial) process in any democratic state, according to which the courts assume that law is “above” the law and thus the state is “bound” by law, state power is limited exclusively by law; man is the highest social value. According to the analysis of the decisions of the European Court of Human Rights, the Constitutional Court of Ukraine and the Supreme Court, judges are currently actively applying the principle of the rule of law in practice. It is essential that more and more often in national practice, it is not just a formal reference to this principle but a detailed analysis of the case due to its various requirements. Promising areas for theory and practice in ensuring the rule of law are developing mechanisms to improve the quality of laws, raising the level of professional and public legal awareness, further active development of civil society in Ukraine, etc. Since the rule of law contains cultural, ethical, political, and legal aspects, a separate complex area to ensure the quality of the rule of law in the judiciary is the further implementation of judicial reform, one of the fundamental principles which should be the formation of the judiciary exclusively from professional, independent, highly moral in the field of law.

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