RULE OF LAW IMPLEMENTATION INTO THE ADMINISTRATIVE PROCESS IN UKRAINE

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Abstract. The relevance of the study is stipulated by the necessity to determine the directions of the rule of law implementation (as a fundamental value of Western law culture) into the national law system. The statistics of the European Court of Human Rights, the study of the rule of law index in the world, the decisions of national courts as to the rule of law principle implementation are analyzed, some decisions of the European Court of Human Rights as to the rule of law are processed. Emphasis is placed on the impossibility of adequate study of the rule of law within the normative understanding of law. The rule of law can function only if the provisions of the natural and law understanding of law are implemented. Only by realizing what the rule of law is can it be implemented into legal practice.

It is noted that the analysis of national courts' judgments allowed experts to draw a number of conclusions about the inappropriate level of the rule of law principle application by domestic judges, which is usually brought to quoting individual judgments of the European Court of Human Rights (mostly the same) or references to articles of the Convention on Human Rights and Fundamental Freedoms (the implicit content of the human rights enshrined in these articles is not disclosed).

The following areas of the rule of law implementation are noted and characterized.
First, the ideological direction: given that the principle of the rule of law is inherent in Western tradition of law based on a natural understanding of law, and is incompatible with the normative school of law, to which indicates the lack of understanding of the content of this principle by a number of judges, then without changing the legal paradigm further implementation of the rule of law principle has no sense. Only by realizing what the rule of law is, it can it be implemented into legal practice. This direction involves radical changes in the system of national law, which can occur only due to involvement of public authorities in legal values.
Secondly, the scientific and practical direction: if within the first direction the emphasis is on future employees of public authorities, this direction concerns those persons who implement the state policy in life today. A prerequisite for holding a position in public
authorities should be a systematic training, an integral part of which should be mastering the subject within which employees will learn about the understanding of human rights, their implicit nature, the rule of law principle, study the practice of the European Court of Human Rights.

Third, the normative and legal direction: the necessity of adoption of the legal act which will systematically define the order of realization of administrative process is proved.

**Keywords:** European Court of Human Rights, implementation of the rule of law, national law, rule of law, rule of law index.

**RELEVANCE OF RESEARCH TOPIC**

In addition to ontological and heuristic functions, any science performs a practical function. Consequently, one of the tasks of scientific research should be to identify ways to improve the relevant social sphere within the subject of study. Therefore, the issue of the rule of law implementation into the administrative process in Ukraine, and borrowing the best practices of European states becomes especially relevant.

It should be emphasized that determining the ways of the rule of law implementation improvement should be preceded by clarification of the existing issues of implementation of this principle into legal activity within the national law system. Thus, some measures have already been taken to implement it. The principle of the rule of law was directly enshrined in the text of the Constitution of Ukraine, and later in the normative and legal acts determining the procedure for certain public authorities activity and those which determine the procedure for the legal process fulfillment. Therefore, it is crucial to study the further process of the rule of law implementation into the administrative process.

We can note that the urgency of studying the directions for improving the rule of law implementation for the national legal science is enhanced by a number of factors, including the following:

1. the very concept of the rule of law is external to the domestic legal system and only from the end of the twentieth century it was borrowed and enshrined into national law;
2. the domestic system of law is largely based on the provisions of the normative understanding of law, with which the principle of the rule of law is incompatible;
3. the principles of law are usually not yet considered as provisions that directly play a regulatory role (they are assigned the role of declarations, slogans);
4. national law system is largely dominated by the understanding of the relationship “a person – state” because of paternalistic discourse, which allows public authorities not to justify decisions, but to refer only to the relevant article of the relevant normative and legal act, as well as in case of human rights restrictions (and as we found out above, legality is only one of the three grounds for the legitimacy of the human rights restriction), which is incompatible with the requirements of the rule of law principle;
5. quite often the substantiation of court decisions is at a low level, references to the provisions of the decisions of the European Court of Human Rights are formal. In the
relationship “a person – public authorities” the principle of human rights priority over the public authorities’ powers is not applied in most cases.

ANALYSIS OF RECENT RESEARCHES AND PUBLICATIONS


At the same time, we emphasize that the most important in the scientific aspect are the monograph by A. Dicey (1915) “Introduction to the Study of the Law of the Constitution” (in which the rule of law was conceptualized) and S. Golovaty (2006) “The Rule of Law” (which clearly, systematically and fundamentally elucidates the rule of law, including through the prism of the national law system).

GOALS OF ARTICLE

The purpose of the article is to determine the directions of further implementation of the rule of law principle into the administrative process in Ukraine.

PRESENTATION OF MAIN MATERIAL

From a methodological point of view, in order to obtain objective results and correctly determine directions for improving the rule of law implementation into the administrative process in Ukraine, we analyzed some statistics data, in particular, statistics on appeals to the European Court of Human Rights (2021) which serves as an indicator of the state of human rights provision within the state (it is clear that a significant number of appeals are considered inadmissible, some appeals are decided as such that do not contain human rights violations enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms, however, these statements indicate the state of relations “a person – public authorities”, the implementation of law principles in these respects, the implementation of law itself rather than formalized prescriptions of prescriptive texts, which also allows us to draw appropriate conclusions in the context of the rule of law). We will analyze the data of a specialized annual survey of the rule of law index (World Justice Project, 2020), which is directly related to the subject of our study and reflects the current state of the rule of law implementation in the national law system and some ways to improve the rule of law principle implementation).

The next stage of the study will cover some decisions of the European Court of Human Rights, where systemic violations in the context of the rule of law within the administrative process take place, as well as provide epistemology of application of the European Court of Human Rights practice in national courts decisions clarifying the perception of the rule of law principle application in the judiciary.
After that we will directly dwell on the ways of the rule of law implementation improving. In 2019, Ukraine ranked third in the number of appeals to the European Court of Human Rights (European Court of Human Rights, 2020). The same data for 2020 (European Court of Human Rights, 2021). However, it is worth taking into account the number of inhabitants, so taking into account this variable, we can conclude that Ukraine ranks first in the number of appeals (we will add that during 2012-2016 Ukraine ranked first in the number of appeals to the European Court on human rights). And in 2017, although formally Ukraine was not the first among the states against which applications were filed with the European Court of Human Rights, however, this was facilitated only by the fact that more than 12 thousand applications were removed from the register and added to the other five applications (case “Burmych and others v. Ukraine” (European Court of Human Rights, 2017)).

In the context of our study, the results of determining the rule of law index in the world require special attention. This is an annual study of the state of the legal system within the states in terms of the rule of law implementation (World Justice Project, 2020).

It is noteworthy that virtually all indicators taken to determine the rule of law index relate to public authorities and the results of their activities, which is quite correct, since the rule of law directly affects these institutions and is a means of limiting their power; and arbitrariness prevention. Therefore, the rule of law principle implementation depends primarily not on citizens, but on public authorities.

According to the results of the Rule of Law Index 2020, Ukraine received an index of 0.51. The same index possess such states as Burkina Faso, India, Thailand. For comparison, the index of 0.50 possess the following states: Albania, Benin, Guyana, Gambia, Colombia, Morocco, Moldova, Peru, Serbia, Suriname. We also give the indices of individual European states: Finland – 0.87; Sweden – 0.86; Germany – 0.84; Austria – 0.82; United Kingdom – 0.79; France – 0.73; Spain – 0.73 (World Justice Project, 2020).

Given the abovementioned, it is necessary to refer to the decision of the European Court of Human Rights (2014) in the case “Shvydka v. Ukraine”, where certain aspects of the administrative process are revealed and its legal assessment is given. Thus, in the circumstances of the case, the applicant, being a member of the “Batkivshchyna” political party, wished to express her attitude to the policy of the President of Ukraine (V. Yanukovych at the time), including to the harassment of the opposition and, in particular, imprisonment the opposition leader Yulia Tymoshenko expressed her civil position as follows. During the celebration of the Independence Day of Ukraine, some time after the President of Ukraine laid a wreath at the monument to Taras Shevchenko, the applicant approached the wreath and quite carefully, without touching the wreath itself, tore off part of the ribbon with the inscription “President of Ukraine V.F. Yanukovych”. In addition to the above reasons, the applicant stated that she wished to express the position that the said person could not be called the President of Ukraine. The next day the applicant was detained for petty hooliganism (Article 173 of the Code on Administrative Offenses of Ukraine) and sentenced to ten days’ administrative arrest. At the time of the applicant’s appeal, she had already served her sentence (European Court of Human Rights, 2014).

We focus on the following two shortcomings identified in this case.
1. An appeal exists in order to be able to review a judicial decision due to a possible error in the substantive and / or procedural law application which has significantly affected the decision. Appeal is a crucial component of justice, preventing the execution of unjust decisions.

Consequently, an appeal against a judgment given when the applicant has already served the penalty imposed on her undermines the very idea of the appeal, the sense of which is to remedy the shortcomings committed in the earlier stages of the proceedings (European Court of Human Rights, 2014). Therefore, the appeal at a time when the applicant had already served the imposed penalty was contrary to the rule of law principle.

2. The analyzed case covers in details another aspect of the administrative process, namely, the general principles of proceedings in cases on administrative offenses.

Examination of the circumstances of the case allows to take the side of the applicant and draw attention to the accusatory nature of the administrative proceedings in her case, to which indicates defying the real motives of her action (instead obscene motives are stated about) and disregarding the person’s right to freedom of expression; the proportionality of the penalty imposed on the applicant (which is appointed contrary to paragraph 16 of the resolution of the Plenum of the Supreme Court of Ukraine of December 22, 2006 № 10 “On Judicial Practice in Cases of Hooliganism”) arouse doubts.

This raises a more global issue which goes beyond administrative law and has a constitutional and law nature (while reflecting in detail, in particular, in the administrative process) and which domestic lawyer – Doctor of Law Sciences, Professor – M. Savchyn (2016) called “postcolonial syndrome”. “The postcolonial syndrome is that the process of exercising power in Ukraine since independence has largely mimicked in a milder version of the Russian imperial practices of government. This misled the constitutional process into an archaic authoritarian framework. The policy of Russian imperial colonialism has led to excessive centralization of power and contempt for local self-government in Ukraine” (Savchyn, 2016). The author also adds: “Excessive centralization of power during the Soviet Union was associated with contempt for the fundamental human rights and freedoms. In particular, it is difficult to find cases of genocide by the state of its own citizens in the world, which can be compared with the Holodomor of 1932/33” (Savchyn, 2016). Certainly, such practices are incompatible with the rule of law principle, as well as with any fundamental principle recognized by civilized nations.

Important in this context is the understanding by public officials of the grounds and limits of the exercise of their powers, the grounds for restricting human rights. In particular, we mean the importance of understanding of the proportionality of restrictive measures.

“Luchaninov v. Ukraine” case also deals with proportionality. Although in this case the disproportion was pointed out by the Chairman of the Supreme Court of Ukraine, who reviewed the case and noted: “The court did not take into account the requirements of Art. 33 and 34 of the Code on Administrative Offenses of Ukraine, namely the paucity of the value of the stolen ..., the age of the offender, the actual absence of damage caused to the company, as well as the fact that Luchaninov O.M. for the first time is brought to administrative responsibility. In such circumstances and in connection with the insignificance of the offence I consider it necessary not to impose fine to Luchaninov O.M., and to be limited to
oral remarks ...” (European Court of Human Rights, 2011). In addition, another issue arises in this case: the unfairness of the proceedings due to a number of factors: the proceeding was not open; adequate time and opportunities were not provided to prepare the defense strategy (European Court of Human Rights, 2011).

This case, as well as the one previously analyzed elucidates a number of aspects of the rule of law principle implementation in the administrative process. Thus, from the latter case we can draw a number of crucial conclusions.

First, it is the use of not formal, but essential and substantive approaches to the exercise of powers. Thus, the Trostianets District Court mostly proceeded from the formal requirements to complete the process of consideration of the case within the period prescribed by law, however, did not take into account the necessity to ensure the rights of the person prosecuted (especially given the circumstances of the offense and damage caused). Choosing between two ways of activity, the European Court of Human Rights, unlike the national court between the aim to close the case and the human right to fair trial chose the latter option. This is fully in line with the priority of human rights over the powers of public authorities. It is important to provide human rights implementation and not to comply with formal requirements.

Secondly, while restricting human rights formal grounds are not sufficient – the predictability of this restriction is by the law. Restrictions on human rights should always comply with the principle of proportionality, be necessary within a democratic society. Herewith the public authority is obliged to justify its own decision, and for this it is necessary, first of all, to analyze and clarify all the crucial circumstances of the case. It should also be borne in mind that a restriction cannot infringe on the essence of law itself, as it will no longer be a restriction but a violation of human rights.

The abovementioned allows us to clarify the promising ways of the rule of law principle implementation into legal activities in general and the administrative process in particular. However, so far only some judgments of the European Court of Human Rights have been focused on. In this part of the study, we also want to draw attention to the application of the European Court of Human Rights decisions by national authorities, mainly courts (at the same time, we also note that national courts in accordance with the Constitution of Ukraine while administering justice are governed by the rule of law principle; therefore if public authorities, legislation on which provides for the rule of law principle do not apply it, the courts should reflect this in their decision, resolving whether to satisfy the relevant appeals). Especially considering that a professional study of this issue was conducted in Ukraine and taking into account the fact that it is because of the practice of this court that public authorities, based on the provisions of relevant regulations, should understand the content of the rule of law principle. This refers to the analysis of more than two thousand court decisions contained in the State Register of Judgments of Courts of Ukraine for 2012-2014 (we note that the above rule of law indices, statistics of appeals to the European Court of Human Rights, some decisions of this court, analyzed above, as well as the analysis of individual decisions of national courts, allow us to conclude that the data obtained in this study are relevant for the present), of which 230 decisions in either case concerned the application of the rule of law principle. And the purpose of the study was to determine the compliance of decisions of domestic courts with the rule of law principle, as well as the

The results of this study revealed, in particular, the following.

1. “93% of the analyzed decisions contain a reference to the principle of the rule of law or to one of its components, on the basis of which justice is administered. At the same time, as a rule, there is no meaningful interpretation of this principle in relation to the essence of the case considered by the court” (Analytical note..., 2016).

2. “30% of judgments contain references to judgments of the European Court of Human Rights concerning “legal certainty” and “legal precision” (Analytical note..., 2016).

In general, the analysis of national courts’ judgments allowed experts to draw a number of conclusions about the inappropriate level of the rule of law principle application by domestic judges, which is usually brought to quoting individual judgments of the European Court of Human Rights (mostly the same) or references to articles of the Convention on Human Rights and Fundamental Freedoms (the implicit content of the human rights enshrined in these articles is not disclosed).

It should be noted that such conclusions correspond to the results of the survey of judges. Thus, only 10% of respondents noted their use of the rule of law principle while administering justice. And only 6% of respondents use the principle of proportionality as part of the rule of law principle. Respondents noted that in most cases they simply referred to the principle of the rule of law or its constituent elements. According to experts, the results of the judges’ questionnaire might indicate that the respondents “do not possess a deep understanding of the content of the Principle and its components, as well as a formal (“ritual”) approach to its application in judicial practice” (Analytical note..., 2016).

CONCLUSION

Therefore, taking into account all the mentioned above, it is necessary to identify the following fundamental directions of further rule of law principle implementation into the administrative process.

The first direction can be conditionally called ideological. Given that the principle of the rule of law is inherent in Western tradition of law based on a natural understanding of law, and is incompatible with the normative school of law, to which indicates the lack of understanding of the content of this principle by a number of judges, then without changing the legal paradigm further implementation of the rule of law principle has no sense. Only by realizing what the rule of law is, it can be implemented into legal practice. This direction involves radical changes in the system of national law, which can occur only due to involvement of public authorities in legal values. And this, in turn, implies the necessity to increase the level of professional training of students of administrative and law higher education institutions.

The fact that in the European sense, human rights, and the rule of law should be taught in secondary education establishments should be added to the facts mentioned above. Mastering jurisprudence in schools should be aimed not at studying the provisions of current legislation (which by the time of graduation will change the most), but at understanding the fundamental principles of the national law system, the true nature of human rights (which
are requirements for the state and its bodies but not to other persons), which will help
students in the making members of civil society.

The second direction can be conditionally called scientific and practical. Within it is
worth emphasizing the importance of such events as scientific conferences, round tables,
training seminars for civil servants on the understanding and implementation of the rule
of law principle. If within the first direction the emphasis is on future employees of public
authorities, this direction concerns those persons who implement the state policy in life
today. However, in the future it will apply to all employees of public authorities, in particular;
in the context of advanced training. In our opinion, a prerequisite for holding a position
in public authorities should be a systematic training, an integral part of which should be
mastering the subject within which employees will learn about the understanding of human
rights, their implicit nature, the rule of law principle, study the practice of the European
Court of Human Rights.

The third direction could be called normative and law. The above makes the issue urgent
which has long been discussed in legal circles in Ukraine. We mean the adoption of a legal
act that will systematically determine the procedure for carrying out the administrative
process.

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