RULE OF LAW CHECKLIST AT NATIONAL LEVEL

CASE OF UKRAINE

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Rule of law Checklist at national level: case of Ukraine

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MEASURING THE SEEMINGLY IMMEASURABLE

When the now world-famous champion of democracy and freedom, the French legal scholar Alexis de Tocqueville, was comparing as far back as in 1836 the institutions of Switzerland with those of England, he expressed his admiration for the habits and manners of the British people, as in particular he was much impressed by their *love of justice*. Tocqueville thought that this "the most standing characteristics of a free people" embraced all the rest, including the *love of law*, as "no free nation can exist" without *respect for justice*, *love for law* and *hostility to using force*[1].

Alexis de Tocqueville wasn't the only foreigner who was in those days positively surprised, more than Englishmen themselves, that England was a country governed by that *spirit of law* which was not at all inherent to the countries of continental Europe. Such an opinion was shared by prominent figures such as the French Enlightenment philosopher Voltaire, the Geneva and English constitutionalist Jean-Louis de Lolme, and the German liberal lawyer Rudolf von Gneist.

All these facts can be learned from the famous classic source already quoted above, that is, the textbook for students studying the constitutional law of England written by Albert Dicey.

1. See *Dicey A.V.* Introduction to the Study of the Law of the Constitution (Reprint. Originally published: 8th ed. London: Macmillan, 1915). – Indianapolis: Liberty *Classics*, 1982. – P. 109.

Being in his day known as a leading scholar only in his native country, he has become known worldwide as a constitutional theorist. In this textbook Dicey presents his own doctrine of constitutional law, referring to the three guiding principles that permeated the unwritten (uncodified) constitution of England of that time. Dicey marked one of his principles with the phrase "*the rule of law*". He was not the one who invented it. But it was he who gave it its initial legal meaning as a principle of English constitutional law, in a nutshell, arguing that it is about "*the security given under the English constitution to the rights of individuals*"[2]. Actually, this principle which reflected the distinctiveness of England enabled the author to most meaningfully describe the difference between the unwritten constitution of England and the written constitutions of the countries of continental Europe and the United States. In this context, Dicey reflects on one of the most marked peculiarities of English life, which is, in his opinion, the most striking one as the English have an unusual feature ("*Englishmen as loving the government of law*"[3]). The theorist interprets this feature as one of the characteristics of the English constitution (in my opinion, even modern domestic constitutionalists are hardly ready to accept the thesis that people's manners (that is, what characterises someone and distinguishes him or her from others) can be interpreted as a characteristic of a country's constitution). However, pursuing this line of thought, the author here argues: for most people who use different expressions to define this feature of the English (such as "government of law", "supremacy of law" or "rule, supremacy, or predominance of law"), the meaning of these expressions remains unclear and inexplicable. Then the author had no choice but to outline his main task as follows: "if therefore we are ever to appreciate the full import of the idea denoted by the term rule, supremacy, or predominance of law, we must first determine precisely what we mean by such expressions when we apply them to the British constitution[4]."

2. *Ibidem*. – P. 107 (*emphasis supplied*).
3. *Ibidem*. – P. 109 (*emphasis supplied*).
4. *Ibidem*. – P. 110.

So what message is conveyed to us by just a few pages of the work of Albert Dicey? They portray properties and features of the English constitution of that time, expressed through the long-standing original habits and manners of the English people (such as the *love of justice*, *love of the law*, *respect for justice*) and defined as their "*loving the government of law*", which made England a country governed by that *spirit of law*, which commendably distinguished the country not only from continental Europe but sometimes even from the United States, the state which, having one of the first-ever written constitutions, emerged out of the ideals of freedom and democracy?

In the words of the author, they tell us about the distinctiveness of the unwritten English constitution as of the end of the 19th century. This distinctiveness resulted from the reality of the idea which Dicey defined with the phrase "rule, supremacy or predominance of law" and which had been already realised at that time, remaining, however, as he admitted, totally unclear to the English themselves.

If the meaning of any of the phrases used to describe the most striking of the features of the English people, that is, the "*loving the government of law*" was incomprehensible even to the English themselves, until Professor Dicey interpreted it for them, then it would be impossible to imagine that it could have been otherwise in continental Europe. And even more so it was in a part of Europe covered by an empire where the absolute power of the autocrat was based on arbitrariness and where no constitution was allowed *per se*. We are talking now about Russia and its political system, known as "*samoderzhavie*" or unfettered *"rule of man"*.

As the book, and, in particular, the title of its Part II, demonstrates, Dicey, as his main objective was to clearly outline the essence of the expressions used to define a particular feature of the country (England) and its constitution, of the many known phrases, gave preference to the phrase *"the rule of law"*. The author describes the essential meaning of it, both as a coherent phrase and an expression defining one of the *fundamental principles of the English constitution*, using three separate but interrelated concepts.

The first one was an antithesis to arbitrariness and despotism of the power existing under any system of government. This concept becomes especially expressive in that part of the book where the author takes as an example the preconditions and consequences of the French Revolution of the XVIII century (when he speaks of "the thrill of enthusiasm with which all Europe greeted the fall of the Bastille"; that "the Bastille was an outward and visible sign of lawless power" and "its fall was felt, and felt truly, to herald in for the rest of Europe that *rule of law* which already existed in England"[5]). The main idea of this concept is to deny any arbitrariness of power and even also broad discretionary powers of the government as authorities must have permission for any of their actions established by the law, and any person may be punished only for a breach of law.

The second concept embodied the idea of legal equality, or in other words, universal subjection of all classes to one law by which ordinary courts administer justice (Dicey: " ... not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals"[6]. Dicey takes the example of France to show that things were somehow different in continental Europe where civil servants had certain privileges as they were not subject to neither the ordinary law of their countries nor the jurisdiction of ordinary courts). In this sense, the idea of exempting officials from the obligation to obey the law applicable to other citizens or from the jurisdiction of ordinary courts was completely ruled out.

The third concept is defined as the *"predominance of the legal spirit"* and characterised as a «special attribute of English institutions». It was the feature that, as Dicey described it, distinguished the English constitution from the constitutions of continental Europe in the most indicative way: while the author considered the "general principles of the English constitution" (which, by the way, defined, in particular, the right to personal liberty and the right of public meeting) as "the

5. *Ibidem*. – P. 113.
6. *Ibidem*. – P. 114.

result of judicial decisions determining the rights of private persons in particular cases brought before the Courts", he, at the same time, saw that "under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result from the general principles of the constitution"[7]. It was about the fact that, in particular, the English constitution hadn't been designed "at one stroke", neither had it been the result of "legislation" but it had been "the fruit of contests carried on in the courts on behalf the rights of individuals". To put it shortly, it is a "judge-made constitution", which bears on its face "all the features, good and bad, of judge-made law"[8]. The noteworthy distinctions between the English constitution and the constitutions of most continental European states was that the English constitution did not declare or define the rights of private individuals as the constitutions of other countries did. In particular, Dicey interpreted the right to personal freedom as a part of the English constitution itself, underpinned by judicial decisions which protected an individual, seeing it as a fundamental difference from, in particular, the Belgian constitution, where such a right was described as the consequence of its declaration in it as an act of positive law. It is the key point of the third concept related to Dicey's doctrine of the *Rule of Law*: here the author emphasizes that the English constitution is pervaded by an "inseparable connection between the means of enforcing a right and the right to be enforced", and such connection "depends upon the *spirit of law* pervading English institutions." From this perspective, according to Dicey, the saw, *ubi jus ibi remedium,* becomes very significant in its bearing upon constitutional law, it means the Englishmen did care more about the remedies for the enforcement of particular individual rights than about any declaration of rights[9]. However, assessing the constitution of the United States and the constitutions of certain states as written or printed documents containing declarations of rights, Dicey emphasizes that the statesmen of America have demonstrated unrivalled skill in providing means for giving legal security to the rights

7. *Ibidem*. – P. 115.
8. *Ibidem*. – P. 116.
9. *Ibidem*. – P. 118 (*emphasis supplied*).

declared by American constitutions. The researcher infers from this that the *rule of law* is as marked a feature of the United States as of England[10].

Anyone who has patiently read that far would ask, and not without reason: why Albert Dicey's interpretation done so far in the past, more than a century ago, of the concept, which had already then been defined by the English phrase "*the rule of law*", should be reviewed in such detail.

In my opinion, that is, in the opinion of the person who, in the early 1990s, being a member of the group of Ukrainian and foreign lawyers and domestic linguists gathered by the Ukrainian Legal Foundation, was looking for a proper Ukrainian equivalent and is still personally responsible for its final choice in favour of the phrase "*verkhovenstvo prava*" [supremacy of law], those, for sure, core elements of three distinct, though "kindred" conceptions, with which Dicey defined the essential content of the integral "*the rule of law*" phrase, show indeed that our choice of that time was clearly unsuccessful.

Probably, now I can't remember why, then, having carefully gone through all possible versions of the translation, we preferred that Ukrainian two-word construct, considering that it would fit best. However, the truth is that none of us was aware at that time either of Dicey's book or that the use of the English expression "*the rule of law*" went far beyond the author's homeland, and since the middle of the twentieth century, the expression became universally accepted and was included as a legal term in the fundamental instruments of international law adopted at universal and European levels, especially the Universal Declaration of Human Rights (1948), the Statute of the Council of Europe (1949), the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

At the same time, I can confess what informed my final choice in favour of the "verkhovenstvo prava" [supremacy of law] word combination. The legal education received in the Soviet era did not provide any knowledge about the values on which the civilized world was built after the Second World War, that is, the values of the West. As students who

10. *Ibidem*. – P. 119.

studied law during the Soviet regime, we have never been taught about *the rule of law*. Instead, according to the instructions given by Trotsky in 1922, we had to grind away at our studies in the area of the so-called *"socialist legality"*. Therefore, not surprisingly, when the Ukrainian Legal Foundation, founded in 1992, began publishing its bilingual bulletin "*Pravnychi Visti – Legal News*", we, due to the lack of theoretical knowledge, were not aware of how to translate correctly into Ukrainian the English phrase "*the rule of law*". At first, we used expressions "*pravna derzhava*" [the state of the law] or "*verkhovenstvo zakonu*"[11] [the supremacy of an ordinary statute], and afterwards: "*pryntsyp zakonnosti*" [the principle of legality][12]. Not earlier than in January 1994 we began using the "*verkhovenstvo prava*" phrase[13]. However, to tell the truth, all the attention was focused at that time not so much on the first main word of the English phrase (*rule*), as on the second one (*law*). After all, its multiple meaning in Ukrainian (specifically its ambiguity – both as "*zakon*" ["an ordinary statute"] and "*pravo*" [law in general]) guided our frank desire to completely get rid of the dogmas of the "theory of state and law" from Andrei Vyshinsky, based on the idea of "*socialist legality*". Therefore, we thought and sincerely believed that by replacing the "verkhovenstvo *zakonu*" terminology with the "verkhovenstvo *prava*", we were acting decisively (if not "in a revolutionary manner"), making a sharp break with the anti-legal positivism of the Soviet era and its methodology. However, the time has proven that it was not exactly so.

For a correct understanding of the "*rule of law*" notion as Dicey put it, the correct translation into Ukrainian of the first word of this English phrase, the word "*rule*", was just as important. Nobody knows exactly now where and why the word "verkhovenstvo" [supremacy] was chosen as its Ukrainian equivalent, as the translation dictionary gave the English noun "*rule*" eight meanings in Ukrainian, among which "supremacy"

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11. See *Holovatyi, S.* For the development of the state based on law. *Pravnychi Visti. The Bulletin of the Ukrainian Legal Foundation,* February 1993, No.1, pp. 1–2.
12. See *Friland, H.* Our projects are long-term ones. *Pravnychi Visti. The Bulletin of the Ukrainian Legal Foundation,* May 1993, No.2, p. 1.
13. See A Message from George Soros to the Ukrainian Legal Foundation. *Legal News. Ukrainian Legal Foundation Bulletin.* – January 1994.– No. 1 (5)

was not mentioned at all, and among those equivalents that fit best were the following: 4) *government*; ***authority*** and 6) *dominion*[14] (in this context, a much newer and almost twice as voluminous dictionary has undergone a significant change, as the word "***authority***" was in vain removed from the fourth meaning of the word "*rule*" and replaced by the word "*dominion*"[15]). However, it can be assumed that some platitudinous and blindly inherited stereotype had its effect at that time. By considering that in order to abandon the Soviet dogma of the "supremacy of an ordinary statute", it was enough to replace the word "zakon" ["an ordinary statute "] with "pravo" ["law in general"], preservation of the formulaic "verkhovenstvo" [supremacy] word was clearly underestimated. And this was the main disadvantage of the translation: after all, the Ukrainian noun "verkhovenstvo" [supremacy] (as *"dominant position", "the predominant influence of someone or something"*[16]) can in no way be considered completely synonymous with any of the Ukrainian meanings given to the English noun "*rule*" (the 1996 dictionary increased the number of meanings to ten). Even such its meaning in Ukrainian as "*domination*" is not the same as the "*dominant position*", and even more so as the "*predominant influence of someone or something*"; it is very close in meaning to the word "***power***". As a result, the two-word "verkhovenstvo prava" construction which was introduced in Ukraine, to correspond to what Dicey defined as *the rule of law*, began to be interpreted mainly through either its "element-by-element" or "etymological" analysis, with both feet on the ground of presumption that without clarifying the meaning of each of its independent words, and first of all of the word "law", it is impossible to be sure of what actually "exerts supremacy" there. If we mention here *the dominant position* that *legal positivism*, close to the Soviet pattern, still occupies in modern Ukrainian jurisprudence, interpreting *law* mostly yet as a "system of rules and norms established by the state," many questions can be

14. See *The English-Ukrainian Dictionary*. – About 65 000 words / Compiled by Podvezko, M. L., Balla, M. I.), Kyiv, Radianska Shkola, 1974. P. 448.
15. See *The English-Ukrainian Dictionary*. – About 120 000 words / Compiled by Balla, M. I., Kyiv, Osvita, 1996. Vol. 2. P. 278.
16. See *The Dictionary of the Ukrainian Language, 11 volumes*. Vol. 1, 1970. P. 335.

raised. How does such understanding coincide with what Albert Dicey wrote in the quoted work? Will the mechanical dismemberment of the two-word Ukrainian expression "verkhovenstvo prava" in order to get to know its sense by "element-by-element" or "etymological" analysis lead us to the understanding of the habits and manners of any people other than the English, which consist of the *love of justice, love of law*, *respect for justice* and *hostility to using force*? Will the domestic manner of carrying out an "element-by-element" or "etymological" analysis result in the conclusion that the expression "verkhovenstvo prava" makes it possible to perceive Ukrainian institutions as such to which the "*loving the government of law*" is inherent? Is it possible to claim by interpreting this phrase in such a manner that modern Ukraine is a country governed by the same *spirit of law* as England of the late 19th century was? Is the *ubi jus ibi remedium* dictum materialised in modern Ukraine in the same fashion as in England of that time?

In my opinion, the Ukrainian word "verkhovenstvo" [supremacy] – whichever way you slice it – is most likely perceived as such that indicates the *higher* position of something (someone) relative to something (someone), and therefore something that is *supreme* is *higher* than something else or is *the highest one* in status, quality, degree, etc.

I consider it unlikely that the search for the most successful Ukrainian equivalent would have resulted otherwise (and perhaps I exclude such a result altogether), even if linguists had then drawn our attention to the fact that the central idea applicable to the British Constitution had been defined in Dicey's work by the phrase "rule, supremacy, or predominance of law", where words such as *rule*, *supremacy* and *predominance* were synonyms, and therefore the three phrases – *rule of law*, *the supremacy of law* and *the predominance of law* – should have been perceived as identical in meaning, and it was exactly the reference to ***"power"*** that conferred equivalence to them and was inherent to such English nouns as *"rule"*, *"supremacy"* and *"predominance"* as well as to their Ukrainian equivalents, as one of their meanings uniting them and being common to them. (It has already been mentioned that one of the meanings of the English noun *"rule"* was ***"vlada"*** [power] in Ukrainian

according to the translation dictionary of 1974)[17]. ***"Verkhovna vlada"*** [supreme power] was one of the three meanings in Ukrainian of the English noun *supremacy* according to the dictionaries of 1974[18] and 1996[19]. As for the English word *"predominance"*, both dictionaries of 1974[20] and 1996[21] give one of its meanings in Ukrainian as ***"domination"***, which is, in particular, the act of *dominating*, that is, ***having power*** *over someone or something*[22].) I base my presumption of the high unlikelihood (or even improbability) of some other than the "verkhovenstvo prava" [the superiority of law] equivalent to the English *"the rule of law"* expression on two main relevant points. The first point of a purely subjective nature has already been dwelt upon: it is a sincere commitment of researchers (from among lawyers) to repudiate the theoretical dogma of the "supremacy of an ordinary statute ", based on the principle of *"Soviet legality"*, the cornerstone of which has been *revolutionary expediency* from the very beginning, and afterwards, it was the so-called *"revolutionary legality"*, put forward by the Bolshevik Party governed by Lenin under the guise of the term "dictatorship of the proletariat," which later transformed into *"socialist legality"*. The second point is mainly objective in nature as at that time nobody of those who were searching for an appropriate Ukrainian equivalent knew anything either about Albert Dicey or his classical work from the second half of the 19th century. And it was impossible to hope for a correct result without a thorough professional knowledge of what had been highlighted in it as the originality of the English unwritten constitution and as one of its fundamental principles and defined by the *rule of law* phrase. No relation was then seen between the academic work of Dicey

17. See reference 14 above.
18. See *The English-Ukrainian Dictionary*. – About 65 000 words / Compiled by Podvezko, M. L., Balla, M. I., Kyiv, Radianska Shkola, 1974. P. 525.
19. See *The English-Ukrainian Dictionary*. – About 120 000 words / Compiled by Balla, M. I., Kyiv, Osvita, 1996. Vol. 2, p. 470.
20. See *The English-Ukrainian Dictionary*. – About 65 000 words / Compiled by Podvezko, M. L., Balla, M. I., Kyiv, Radianska Shkola, 1974, p. 398.
21. See *The English-Ukrainian Dictionary*. – About 120 000 words / Compiled by Balla, M. I., Kyiv, Osvita, 1996. Vol. 2, p. 155.
22. See *the Dictionary of the Ukrainian Language in 11 volumes,* Vol. 6, 1975, p. 52.

and the sought Ukrainian equivalent of the English *"rule of law"* phrase. And even if the discussion had turned to the point that there was no better adviser on this issue than the well-known academic work of the professor at Oxford University, the only suitable source for this purpose could then have been his book, first translated into Russian under the editorship of Professor Pavel Vinogradov in 1891 and republished in 1907[23]. However, I have no doubt whatsoever that then it could not have served as a *guideline*, because its Russian translation appeared so inconsistent that it practically distorted the sense of Dicey's idea, making it impossible to truly get to know its essence. For example, such synonymic fixed phrases as *rule of law* and *supremacy of law* were translated in an extremely chaotic fashion: *rule of law* was translated as «**zakon**» [an ordinary statute][24], «**verhovenstvo zakona**» [supremacy of an ordinary statute][25], «**gospodstvo zakona**» [dominance of an ordinary statute][26]and «verhovenstvo prava» [supremacy of law][27], and the *supremacy of law was translated as* «**verhovenstvo zakona**» [supremacy of an ordinary statute][28], «verhovenstvo prava» [superiority of law][29] and «gospodstvo prava» [dominance of law][30]. And the *"spirit of law"* phrase (which cannot mean anything else than *"dukh prava"* in Ukrainian) was translated into Russian as **"dukh zakonnosti"** [the spirit of legality][31]. Professor Vinogradov sought to present to Russian readers the essence of the matter which he himself characterised as "*some particular points of the English jurisprudence*". Not only he acknowledged the difficulties of the topic but also explained them, in particular, by "*Dicey's legal mindset*". The Russian professor noted that Part II of Dicey's

23. *A. B. Dicey*. Osnovy gosudarstvennogo prava Anglii [The fundamentals of the state law of England] (*Introduction to the study of the law of the constitution*) Edited by Prof. P. G. Vinogradov. A translation, updated on the basis of the 6th English edition by O. V. Poltoratska. Second edition. Moscow. I. D. Sytin's printing house. 1907.
24. *A. B. Dicey*. Ibid., pp. 208, 372.
25. Ibid., p. 211.
26. Ibid., p. 214.
27. Ibid., p. 212, 221.
28. Ibid., pp. 208, 211.
29. Ibid., pp. 208, 212.
30. Ibid., p. 337.
31. Ibid., p. 227.

work, which "*treats the dominance of law*" was the most important for the Russian reader. However, if we take into consideration the fact that Professor Vinogradov advised to perceive the "*rule of law*" concept to a limited extent and only within the "*idea of the dependence of political organization on common law*", then it could hardly be expected that any of the Russians who read this book at the turn of the nineteenth and twentieth centuries would have in any way connected this legal principle "*with the conditions of continental life*."[32] The same could be said about Ukrainians, even those of the late 20th century and, in particular, those who would have dared to be governed by the Russian translation of Dicey's book in a search for an appropriate Ukrainian equivalent of the English "*rule of law*" phrase.

Now it is evident that not only Dicey's academic work translated into Russian but also the most authoritative official sources, that is, international legal instruments were, at the end of the 20th century, totally unsuitable for this purpose. It can be seen, at the official web portal of the Verkhovna Rada of Ukraine (the "Legislation of Ukraine" database), that in the preamble of the globally accepted document[33], in its part dedicated *exactly to what* is essential for the protection of human rights[34], the equivalents of the English phrase "*the rule of law*" are "**vlast' zakona**" [the power of an ordinary statute] phrase in the translation into Russian (the official UN language) and "**syla zakonu**" [the force of an ordinary statute] phrase in Ukrainian (unofficial translation). The point is that neither "*the power of an ordinary statute*" nor "the force of an ordinary statute" are "*exactly what it is*".

Whereas the *"rule of law"* fixed phrase, borrowed from the English national tradition and included in 1948 by the United Nations to a legal

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32. See *Pavel Vinogradov.* A foreword to the first edition of the Russian translation. *A. B. Dicey*. Ibid., p. XXIV-XXVII.
33. The Universal Declaration of Human Rights (1948). https://zakon.rada.gov.ua/laws/show/995_015#Text, accessed on 15.04.2021
34. It follows from the wording of this part of the preamble that «it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected *by the rule of law*», that is, «by what exactly *the rule of law* is».

act of global dimension, required a harmonized interpretation suitable for its uniform application in any national legal system, with due regard for its particularities, the International Commission of Jurists (ICJ), founded in 1953, was entrusted to deal with the issue as a specialized non-governmental institution of the United Nations. The result was obtained not earlier than following the First (Athens, 1955) and Second (Deli, 1959) International Congress of Jurists and demonstrated that the "*rule of law*" notion is neither "the power of an ordinary statute", nor "the force of an ordinary statute", nor "the supremacy of an ordinary statute"[35].

However, when Ukraine became the member of the Council of Europe (7 November 1995) and the Ukrainian representatives began to participate in the activities of the bodies of this organisation, it revealed that for many years at their official meetings the interpreters have been translating the English phrase "*the rule of law*" into Russian exclusively as "***verhovenstvo zakona***" [supremacy of an ordinary statute] which in fact is a counterpoint to the English notion. More than once I approached Russian interpreters suggesting that such translation was erroneous and each time I heard the response: "It is our Russian national tradition". Actually, this fact made me initiate the debate of the content of *the rule of law* concept and of whether it was translated correctly into Russian in the Council of Europe bodies, in particular in its Parliamentary Assembly (PACE)[36]. The Assembly, following the debate on the special report dedicated to this issue[37], approved the resolution where it stated that the English "*rule of law*" phrase should be translated into Russian as "***verhovenstvo prava***" and not as "*verhovenstvo zakona*", in the same manner as it was translated into French as *prééminence du droit*, and not as *prééminence de la loi*[38].

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35. See, in particular: The Rule of Law in a Free Society: a report of the International Congress of Jurists, New Delhi, India, January 5–10, 1959. – Geneva: International Commission of Jurists, 1959. – P. 196–197.
36. See The principle of the rule of law: Motion for a resolution presented by Mr Holovaty and others. *Doc. 10180, 6 May 2004.*
37. The principle of the Rule of Law: Report of the Committee of Legal Affairs and Human Rights. Rapporteur: Mr Jurgens (Netherlands). *Doc. 11343, 6 July 2007.*
38. The principle of the Rule of Law. Parliamentary Assembly. Resolution 1594 (2007), para. 3.

Here I must confess: it was the second time that I agreed with the wrong decision of an official body (this time an international one), and this mistake should be corrected. After all, the provision of § 3 of the PACE resolution about the "correctness" of the translation of the "*rule of law*" phrase into Russian as "verhovenstvo prava" [the supremacy of law] not only came off my tongue, it was my work (exactly my proposal, which Professor Jurgens from the Netherlands accepted conceptually, and I provided him with the written text, transliterated from Russian in Latin letters ("*verkhovenstvo prava*")). It first happened when the constitution of independent Ukraine was written and approved. At that time, following the political confrontation with staunch supporters of the "verkhovenstvo zakonu" [supremacy of an ordinary statute] (advocated by Communist and Socialist MPs), the qualified majority of the parliament voted in favour of the phrase "verkhovenstvo prava" [supremacy of law], which I strongly recommended, as a counterpoint to the notion of the "verkhovenstvo zakonu" [supremacy of an ordinary statute]. That was how the general wording of the provision of part 1 of Article 8 of the Constitution of 1996 appeared ("In Ukraine, the principle of *the rule of law* ("verkhovenstvo prava") is recognised and effective")[39]. It then seemed to me as an incredible success and a great victory. At that time it had not yet been known how ruinous appeared the threats generated later by the practice of some scholars who clarified and interpreted the sense of this legal innovation, defined as "verkhovenstvo prava" [supremacy of law], applying "element-by-element" or "etymological" analysis of it, dissecting it to assess each of its verbal elements and primarily ascertaining in such a manner *what* "exerts supremacy" and *over what* or *over whom*. One could have been stuck for long in such a "Ukrainian-style interpretation", if not for the already quoted PACE Resolution 1594 (2007), where, given the "lack of consistency and clarity when translating" the term of the *rule of law* in Council of Europe[40] member states, the Assembly, having emphasised the need to ensure the unification of understanding of the concept, recognized that the

39. Emphasis *supplied*
40. Resolution 1594 (2007), para. 4.

subject merited further reflection with the assistance of the Venice Commission[41].

Therefore, the consideration that took place in 2004 in PACE[42] and was triggered by me, of an infallible understanding of the content imprinted in *the rule of law* concept, which had already transcended the limits of a particular national legal system and became a part of the triad of interrelated values whereon the post-war European order had been built, as well as the report of the PACE Legal Committee[43], consequential in relation to this initiative, and the PACE resolution[44] adopted on its basis, are only the starting point provided by the Assembly to seek the fullest possible agreement on a clear understanding of *the rule of law* notion by the entire European community. However, without such a starting point nobody could have imagined those famous achievements that the Venice Commission may be rightfully proud of in this respect.

First of all, it is about [45]the Report of the Rule of Law[46] (it is available in Ukrainian at the official website of the Venice Commission *and in the Pravo Ukrainy magazine*). It was only the first stage of the conceptualisation by the Commission of the essence of the *rule of law* notion. By the way, the report contains comments directly related to the Ukrainian context, where it is pointed out that within its framework the perception and interpretation of the concept of the *rule of law* are burdened by the legacy of the Soviet model of legal positivism[47]. The report itself is generally characterized by a theoretical bias, although its annex contained a checklist of "benchmarks" (the six core components) which, in

41. Resolution 1594 (2007), para. 6.2.
42. The principle of the rule of law: Motion for a resolution presented by Mr Holovaty and others. *Doc. 10180, 6 May 2004.*
43. The principle of the Rule of Law: Report of the Committee of Legal Affairs and Human Rights. Rapporteur: Mr Jurgens (Netherlands). *Doc. 11343, 6 July 2007.*
44. The principle of the Rule of Law. Parliamentary Assembly. Resolution 1594 (2007).
45. Source: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev2-ukr, accessed on 15.04.2021
46. Report on the Rule of Law. Adopted by the Venice Commission at its 86th plenary session (*CDL-AD(2011)003rev*, Venice, 25–26 March 2011). Pravo Ukrainy. 2019. No. 11, pp. 14–38.
47. See paragraphs 15 and 33 and footnotes 9 and 28 in the Report.

the Commission's view, gave *the rule of law* a practical nature. However, it can be argued that the mentioned above was enough for anybody to be ascertained (if there is an intention to do so) of the fact that the essence of the notion under study is not related at all to the approach (still!) applied in Ukraine, that is, a search for *what* exerts supremacy and over *whom/what*.

At the second stage, pursuing the goal of clarifying the content of the "benchmarks" themselves, the Commission developed the *Rule of Law Checklist*, and its adoption in 2016 was its actual triumph (it is available in Ukrainian on the official website of the Venice Commission[48]). The practical orientation of this document ensured its success, as it was designed as a working tool to impartially assess whether constitutional and legal structures (institutions), the current legislation, case law, mechanisms and procedures and everything else that is extremely important for the protection of individuals from the authorities' arbitrariness in any given country, comply with the requirements of what is defined in English as the *Rule of Law*. The official endorsement of this document was an apparent indication that the Commission had its triumph; it became a practical tool, endorsed by the Committee of Ministers of the Council of Europe (at its 1263rd meeting, 6–7 September 2016), the Congress of Local and Regional Authorities of the Council of Europe (at its 31st Session on 19–21 October 2016) and by the Parliamentary Assembly of the Council of Europe (at its 33rd Session on 11 October 2017). Other European (governmental and non-governmental) institutions such as the European Commission (EC)[49] and the Council of Bars and Law Societies of Europe[50] use it as well as a practical tool. The provisions of this document as well as the means used by the European institutions to apply it incontrovertibly

48. Source: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-ukr, accessed on 15.04.2021
49. See: 2020 Rule of Law Report: The rule of law situation in the European Union. {SWD(2020) 300–326}. Source: https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en, accessed on 15.04.2021
50. See CCBE statement on the 2020 Rule of Law Report. Source: https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/ROL/EN_RoL_20201217_CCBE-statement-on-the-Rule-of-Law-Report-2020.pdf, accessed 15.04.2021

demonstrate the following. First, it is not at all about *anything* that would "exert supremacy" *over* something/somebody or anything that would somehow or otherwise get the "superior status", or anything that would have "a superior influence" over something else (as the interpretations of the word "supremacy" suggest[51]). Nor is it at all about the "supremacy of law" as the "domination of law in society," a notion declared (mistakenly!) by the Constitutional Court of Ukraine[52] in 2004 and loved so much by everyone who thoughtlessly repeats it. Second, it is as well not just about *law* as a set of formal rules. And while this document does discuss the topic of *law*, it does so not for the sake of revealing the meaning of this concept (because there is a saying which argues not without a reason that: "there are as many interpretations of the law as there are legal scholars"), but within the review of requirements as to the quality of each part of it such as norms, the proper hierarchy of legal norms, democratic nature of the procedure for their adoption, the binding nature of their observance and implementation, their legal certainty, foreseeability, continuity and consistency, etc. Furthermore, it is about the number of relevant, primarily judicial, institutions, mechanisms and procedures, the lack of which makes it impossible to implement what the English language calls the *Rule of Law* in the national legal systems. So, in short, it can be said that this document of the Venice Commission is a practical guide to the *world* of the *Rule of Law*, characterized primarily by the "*loving the government of law*" as Albert Dicey put it and "*hostility to using force*" according to Alexis de Tocqueville. If we reformulate the position of the International Commission of Jurists expressed at the time of 1959 Delhi Congress, we could say that we are dealing with a *world* of ***doctrines, principles, institutions, and procedures that are vital for protecting individuals from the arbitrariness of the state and enable an individual to own his or her human dignity***. Even a blind could see that it is not exclusively about *law* as a *corpus of provisions* (norms, rules, etc.), that is, the positive law. And it is clear that it is not about the *law*

51. Dictionary of the Ukrainian Language, 11 volumes. Vol. 1, 1970. P. 335.
52. The Decision of the Constitutional Court of Ukraine No. 15-rp/2004 of 2 November 2004 (case No. 1-33/2004, paragraph 4.1.).

that "exerts supremacy" in this meaning. Therefore, it became obvious that the definition of such a *world* by such Ukrainian expressions as the *"verkhovenstvo prava"* [supremacy of law] or *"panuvannia prava"* [dominance of law] (or *"panuvannia verkhovanstva prava"* [dominance of the supremacy of law][53] which is even worse) as splittable concepts, resulted in the misunderstanding in Ukraine of the English *"rule of law"* phrase as an idiomatic expression.

As both the *Rule of Law* phrase used by Albert Dicey to define an ideal, a doctrine and a principle, and the Venice Commission documents (the *Report of the Rule of Law* (2011) as a theoretical guide, and the *Rule of Law Checklist* (2016) as a practical one) have their philosophical and legal focus at the same thing, in particular, *denial of the arbitrariness of the state power* and *enabling an individual to own human dignity*, I continue to argue that it is the Ukrainian neologism ***"pravovladdia"*** that is the exact unit of terminology that (as an equivalent) most precisely matches the sense of the English *"rule of law" concept*. I came to that conclusion 25 years ago as the result of my many years of research on this item on the basis of Western scholarly sources[54]. This neologism, which I invented at that time, with significant difficulty takes root in the Ukrainian legal language. However, the constitutions of certain countries, where Slavonic languages are spoken, use similar definitions, for example, ***vladavina prava*** in the constitutions of Serbia, Croatia and Montenegro, and ***владаньето на правото*** in Northern Macedonia. Lately, the Polish translations of the official documents of the European Union (and its bodies) use the term ***praworządność*** identical to the Ukrainian neologism *pravovladdia*. Another example can be an academic publication of a Slovak author where *vláda práva is used as the Slovak equivalent* of the English *Rule of Law* in an EU document[55].

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53. See: The Principle of the Rule of Law: Theory and Practice, 2 volumes. Edited by Yu. S. Shemshuchenko [general editorship by Yu. S. Shemshuchenko / Publishing editor V. B. Averianov, Kyiv, 2008, Volume 2. The Principle of the Rule of Law in the State Activities and in the Administrative Law. P. 111.
54. See, in particular: *Serhii Holovatyi*. The Rule of Law. A monography in 3 volumes. Kyiv, Fenix, 2006. Book 3, pp. 1663–1665.
55. See: *Lukáš Lohynský*. Vymahatelnost vlády práva v kontextu postavení nové vlády v Polsku. Bakalářská práce. Brno, 2016 (Masarykova Universzita. Fakulta sociálních studií)

One should be aware of the fact that no European language except for Belarusian, Russian and Ukrainian uses definitions similar to the "supremacy of law" expression.

Let's proceed from the fact that *the rule of law* is established as a European value, political ideal and legal concept. However, it is not possible to strengthen it without appropriate national-level mechanisms related to the structural pillars of the state itself and the functioning of its institutions, and, first of all, implementation tools for its main principles, as the rule of law is a cornerstone of every national legal system within the modern European legal order.

There is no need to invent formal definitions of the rule of law to fully implement it as something that works effectively. Even the Venice Commission itself came to a conclusion that it is indefinable. However, at the same time, an issue arose as to whether the rule of law is also immeasurable in the same fashion as it is indefinable. Thanks to the document of the Venice Commission, the *Rule of Law Checklist* (CDL-AD (22016) 007), it became clear that it is measurable indeed: it is enough to know the core elements identified by the Commission in this document, which are valid everywhere, do not depend on the national context, are classified in the document according to expanded reference tests (*benchmarks*), based on European and universal international standards set out in the relevant sources; these benchmarks (the list of which is not exhaustive) make it possible to do a kind of a "radiography analysis of the ideal, rule-of-law-compliant state, resulting in a picture of the state of the rule of law in the given country and in a given moment[56].

This document elaborated by the Venice Commission has served as a template for the publication, prepared by the group of researchers

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[Enforcement of the rule of law in the context of position of the new government in Poland]. Source: https://is.muni.cz/th/427187/fss_b/, accessed on 15.04.2021

56. See: *Simona Granata-Menghini.* Measuring the Immeasurable. Report at the International Conference "The role of constitutional review bodies in ensuring the Rule of Law in rule-making and law-enforcement". Minsk, Belarus, 27–28 April 2017. CDL-JU (2017)011.

under the guidance of Professor M. I. Koziubra, which is proposed to Ukrainian readers and users as a *rule of law checklist of a national level*, adapted to satisfy the needs of the domestic legal system. This publication work is special in that while it elaborates on the so-called "classic" list of elements of the rule of law defined by the Commission and relevant to Ukrainian circumstances (such as legality, legal certainty, equality before the law and equality in law, prevention of abuse of power, access to justice), the authors also added to it the principle of proportionality taking into account its extreme importance for the domestic legal practice. Moreover, the national level checklist changes somehow the approach to the presentation of such a component of the rule of law as the prevention of abuse of power as the main focus is shifted to limiting discretionary powers, which is also attributable to particular features of the application of legal norms. Each of its elements is divided into detailed theoretical components, which are grouped into clusters to address the substance of each relevant principle. Each cluster is accompanied by expert comments which are bases on the review of the legislative work of the *Verkhovna Rada* of Ukraine and the case-law of Ukrainian courts. As international standards are being implemented in the national legal system mainly through the adoption of legislation, therefore the national checklist focuses primarily on the legislative process and the practice of rulemaking. Accordingly, the main target group of potential users of this publication are specialists involved – both in the parliament and outside it – in drafting normative acts, their expert evaluation, adoption and application.

I hope that this product of the creative team of scholars will also be useful to all judges (regardless of the judicial sphere) as the professional activity of judges is a continuous process of applying legal provisions at all times, as it is essentially required by the rule of law.

20 April 2021.

LEGALITY

Legality is one of the crucial components of the rule of law. It was seen in such a fashion by those who shaped the *rule of law* concept, and, in particular, by its founder, British constitutionalist Professor Albert Dicey. Such attitude is still preserved by the contemporary followers of this theory, as well as the authors of international legal instruments dedicated particularly to this concept, including such documents issued by the Venice Commission as the *Report on the Rule of Law*[57] and the *Rule of Law Checklist*[58], adopted, respectfully, on 25–26 March 2011 and 11–12 March 2016, available in Ukrainian, in particular, on the official website of the Commission.

The domestic legal – and not only legal – sources base themselves on the past traditions and continue to interpret legality as strict and unswerving respect for and compliance with laws and regulatory acts based on laws by all persons at law, that is, by authorities and local self-government bodies, their officials, public and other associations and citizens.

While it could not be denied that the main requirement of the legality is that statutory and regulatory law should be implemented consistently and unswervingly, however, it should be argued that if legality is to be considered in the light of the rule of law then a considerable adjustment of such definition is required.

The legality concept which has been prevailing in our society for decades was focused primarily on formal and procedural requirements and totally ignored requirements regarding the essence of "laws". It

57. https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev2-uk
58. https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-ukr

remained indifferent to the real purposes of the "law" and with equal efficiency served different purposes, both progressive and reactionary, coexisting with brutal violations of natural, inalienable human rights and freedoms by the authorities. Formal legality provides no mechanisms to limit voluntarism and arbitrariness. In this regard, it contradicts the historic tradition of the rule of law which was not intended to formally ensure the order defined by laws and regulatory acts established by public authorities but strived to affirm such legal order that would limit the absolute state and primarily executive power and put it under public control by creating appropriate legal mechanisms for that end. This means that, unlike the Soviet tradition (which in fact did not differ from the legalistic and positivist interpretation of legality), the *Rule of Law* concept does not limit legality to formal execution of any "law", or to the so-called *Rule by the Law*, irrespectively of its content. Such formal interpretation of legality, in the opinion of almost all Western legal scholars, does not sufficiently ensure that power is limited, which is an essential requirement of the rule of law.

The rule of law provides for the legality based primarily on the recognition of and unconditional attitude to a human being as the highest value, and on his or her protection from the arbitrariness of authorities and their officials; such legality is rather often called "pravozakonnist" ["rule of law"] in the domestic sources. Such approach to interpretation is absolutely compliant with the case-law of the European Court of Human Rights, which more than once emphasised in its decisions that the "by law" concept means "in such a way that law provisions do not contradict the rule of law principle".

Second, according to the principle of the rule of law, the legality requirement extends primarily to public authorities and its officials and not to citizens and their assemblies contrary to what the domestic jurisprudence often affirms following an old Soviet tradition. Such expansion of the number of entities that are subject to legality minimises the increased danger from breaches of law committed by officials compared to those committed by individuals and actually contradicts the rule of law as the latter opposes arbitrariness of authorities.

After all, when it comes to mass violations of legality in times of totalitarian regime (especially in the 1930–50s), it means that law was violated not by ordinary citizens but by the state bodies and primarily its repressive machinery and their officials. Jurisprudence widely applies another term, that is, the "breach of the legal order" which predominantly covers violations of law by individuals.

Legality presupposes also that nobody can be punished if he or she hasn't violated the law, as well as the inevitability of sanctions for its violation.

Legality is a rather multidimensional and polychrome phenomenon. In its various manifestations it can be:

- a principle which regards the functioning of the state, its bodies, local self-government bodies and officials at all levels and requires them to act in strict accordance with the law and within its limits;
- a method of the state administration of the society and its certain spheres which means that relevant bodies and their officials exercise their functions and powers exclusively in a lawful manner, that is, by adopting statutory legislation compliant with the rule of law principle and regulatory legislation based on it and by ensuring that they are unswervingly complied with;
- such political and legal regime in the society which creates such a moral and political climate in a given country based on precise and unswerving compliance with laws intended to protect human rights and freedoms and protect individuals from arbitrariness and societies from violence and chaos, becomes the basis for people's activities.

1. Supremacy of the Constitution

Does the Constitution of Ukraine enjoy a high level of legitimacy among individuals?

Does the Constitution cover or embrace all the requirements being the elements of the rule of law?

Has the principle of the highest legal precedence in the system of legal acts been consistently enshrined in the Constitution?

Do rule-making practice and the application of norms respect the principle that the Constitution has superior legal power?

Is the principle providing for the direct effect of constitutional provisions in the rule-making and application of norms guaranteed?

To what extent does the current legislation conform with the Constitution of Ukraine?

Are the laws required by the Constitution adopted promptly?

Are the regulations necessary for the Constitution to be implemented adopted promptly?

Do the actions of the executive branch conform with the provisions of the Constitution?

Are the means provided by the Constitution and aimed at restricting authorities within the requirements declared by it, sufficient?

Do bodies and officials, provided for by the Constitution and intended to protect human and citizen's rights and freedoms, act effectively?

Are judicial guarantees of human rights protection provided for by the Constitution effective?

Commentary

The foundation of the consolidation and progressive strengthening of the regime of legality is the Constitution, the fundamental law for both society and the state.

The constitutions of modern democracies are the embodiment of universal and national values, including the rule of law and its components, and this is reflected in the fact that these fundamental laws embrace fundamental human rights and freedoms and that all actions by the state are subordinate to rights and freedoms and interconnected with

them. This affords stability and certainty to the legal systems, being a fundamental precondition for the rule of law.

The superiority of the Constitution as a Basic Law is regarded among its most important features; it means its determinant character and priority in the system of sources of domestic law, guaranteed by the special procedure for its adoption and amendment.

The Constitution is the constituent act of public law adopted either by people themselves (through a referendum) or a special representative body (a constituent assembly) or the parliament. The constituent nature of the Constitution is manifested in the fact that it establishes fundamentals of the legal status of a human being and a citizen, state sovereignty, political regime, the organisation and functioning of power based on the principle of popular sovereignty and the separation of powers into legislative, executive and judicial branches.

Therefore, from such a perspective, the level of popular legitimacy of the Constitution and acceptance of its provisions, which reflects the general level of legitimacy of authorities in a given country, is important. The loss of such legitimacy threatens to destroy the foundations of democracy, statehood and parliamentarism, and undermines the guarantees of fundamental human and citizen's rights and freedoms.

Among indicators pointing to the superiority (determinant nature) of the Constitution the principle of its highest legal precedence should first be mentioned. It means that all laws and regulatory acts should be compatible with the Constitution and if not, be declared contrary to the Constitution and, respectively, invalid.

The Constitution is a basic legal instrument, its provisions create the primary foundation of regulating social relationships and the actions of public authorities and their officials. As the act of the highest precedence, the Constitution plays a dominant role in the hierarchy of domestic legal acts.

It consolidates the whole national legal system on the basis of unified principles and fundamental norms regulating the functioning of the state. Therefore, if the Constitution is to play such a dominant role, a

number of provisions should be enshrined in it and consistently implemented throughout all the legislative system.

It is primarily about such components of the rule of law as legal certainty, prohibition of arbitrariness, access to justice, respect for human rights, non-discrimination and equality before the law, as well as about enshrining, in the Constitution itself, the principle of its supremacy in relation to laws and regulatory acts (issued by the President, the Cabinet of Ministers and central executive authorities, etc.).

The supremacy of the Constitution is reflected in the fact that its provisions are directly applicable.

The direct applicability of the Constitution is one of the decisive factors of its integration into social practice. Contrary to the popular belief, which says that the direct applicability of the constitutional provisions is related exclusively to the application of norms, in particular, the jurisprudence, it should be argued that such applicability is inherent in all spheres (legislative, executive and judicial) of the functioning of the state. The Constitution is directly applicable also when an individual exercises his or her constitutional rights and freedoms.

The direct applicability of the Constitution means that lawmakers should, by adopting laws, make constitutional provisions more concrete and detailed and establish procedural frameworks for their implementation. Law-makers have no right to derogate from the Constitution and values enshrined in it. Unfortunately, the domestic legislative practice provides many examples of non-compliance by the Verkhovna Rada of Ukraine with this requirement.

The Constitution of Ukraine contains a number of other legal institutions and mechanisms which, if implemented, are capable of ensuring that the principle of the rule of law in general and the legality as its component are put into practice.

Legality puts forward special requirements to the functioning of state authorities and their officials. Article 19 of the Constitution provides that bodies of state power and their officials are obliged to act only on

the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine.

The legality requirement puts forward the need to have instruments to restrain authorities and their officials within the established requirements and to have relevant supervision of their functioning (such as constitutional supervision, mechanisms for appealing against wrongful decisions, actions and inaction of state authorities and their officials). The judiciary plays an essential role within the system of such instruments and the observance of human rights ultimately depends on its effectiveness.

Consequently, we can assess whether the supremacy of the Constitution of Ukraine is real or fictitious, and accordingly assess the domestic state of legality, depending on whether the constitution meets its purpose, that is, whether it embodies the patrimony of humankind in the sphere of the rule of law, whether the provisions of the Constitution are implemented, to what extent public authorities and their officials effectively guarantee and protect human and citizens' rights and freedoms, whether appropriate judicial guarantees to protect human rights exist, whether the principle of the rule of law is actually enforced, whether necessary laws are adopted timely and are compatible with the Constitution.

2. Precedence (supremacy) of laws in the hierarchy of legal acts

Is the content of the laws compatible with the constitutional principles and values enshrined in the Constitution?

Are the powers of public authorities established by law with due comprehensiveness?

Are there clear boundaries established by law between the powers of different authorities?

Does the parliament play a decisive role in adopting laws? Does the parliament comply with procedures provided for in the laws?

Does the regulatory legislation comply with the constitutional requirement "on the basis and for the execution of laws"?

Does the President comply with the statutory requirements as to the adoption of regulatory acts by him or her?

Do the rule-making by the Government have an impact on the national legislative policy?

Do public authorities and their officials exercise their powers and functions on the basis of the Constitution and the laws?

Are there any instances when public authorities' actions lack a legal basis?

Do public authorities comply with their obligations established by law to ensure and protect human rights?

Does the law define procedures for the authorities delegated with state functions in an appropriate manner?

Commentary

The precedence (priority) of statutory law in the system of legal acts is one of the main elements of legality.

The former domestic tradition often placed the supremacy of the law requirement among specific requirements pertaining to the principle of legality. As the principle of the rule of law is introduced in the domestic legal system, it seems doubtful to preserve the very term of the "supremacy of the law". Operating by these two terms leads to certain confusion because the English term "*rule of law*" is often translated as the "supremacy of the law" by politicians, journalists and in particular by translators dealing with foreign literature, as it is known that the English "law" is translated into Ukrainian as both "pravo" ("law as a legal system") and "zakon" ("law as a statute"). The term "superiority of the law" is not present in the Constitution because of such confusion and the need to prevent it.

At the same time, the Constitution of Ukraine contains a number of provisions demonstrating that it firmly supports the leading role (superiority) of the statutory law in the system of legal acts (certainly, after the Constitution itself as the highest source of law). This is perhaps most convincingly evidenced by Article 92 of the Constitution, which establishes a list of issues related to the subject of regulation by statutory law. This list covers almost all spheres of legal regulation, although in some instances the legal definition is exhaustive and provides no opportunities for regulation by regulatory law, and in other instances, it provides that the laws should only establish regulatory foundations and make possible to detail them by adopting secondary legislation.

The central role of laws reflects an essential principle of democracy which means that power belongs to people who exercise it directly and through representative bodies, including parliaments. Such central role of laws should be a foundation for the unity and internal coherency of the whole system of legal acts, which is a requirement of the rule of law.

Laws should define the essentials of the organisation and the functioning of public authorities and their officials with due thoroughness and precision. Laws must not delegate to executive bodies powers to regulate matters that are to be regulated exclusively by law (Article 92 of the Constitution of Ukraine), they should define the scope of powers of each of such authorities with the appropriate comprehensiveness.

Human and citizen's rights and freedoms, guarantees of such rights, the main obligations of individuals, citizenship, the legal personality of individuals, the status of aliens and stateless persons, procedures for the use of languages, the territorial organisation of Ukraine, the system of the judiciary, legal proceedings, the status of judges, organisation and functioning of the public prosecution, fundamentals of liability under civil law, the types of conduct which are criminal or administrative or disciplinary offences and the liability for them must be established exclusively by laws. The fundamentals of foreign affairs, use of natural resources, national security and local self-government are also regulated exclusively by laws.

The parliament should play a decisive role in the statutory regulation of the most important social interactions and in formulating public legal policy. Therefore, such actions should not be executed by the government as governmental acts should be issued to implement public legal policy and not to formulate it.

The priority (superiority) of statutory law does not mean only that everybody concerned should unswervingly abide by the laws but also that public authorities are required to approve their regulatory acts on the basis of the laws and in order to implement them. If executive bodies act without any legislative basis, it is a direct violation of Article 19 of the Constitution. Public authorities must also perform their functions established by law to ensure and protect human rights and protect the rights of an individual from their violation by private actors.

If executive bodies delegate certain powers to other bodies, in particular, local self-government, such powers should be exercised on the due statutory basis, including the procedure for exercising such powers.

When all public authorities function, adopt legal acts and decide on all other matters within the scope of their powers in accordance with procedures set out by the Constitution and the laws, it is an important indicator of legality. If procedures set out by laws or regulatory acts are not complied with or lacking, it is a serious violation of the principle of legality.

3. Grounds for the rule-making powers of the executive and their limits

Is law-making an exclusive prerogative of the parliament? Can the parliament pass legislation on issues not included by the Constitution in its mandate?

Can it be justified if the parliament delegates some of its rule-making powers to executive bodies?

Is there a need to define by laws the rule-making powers of executive bodies and their limits?

Are there instances where human rights and freedoms are governed by regulatory legislation?

Are there specific instances where regulatory legislation is approved on the organisation and functioning of executive authorities?

Do executive authorities approve regulatory legislation determining their rule-making powers?

Do rule-making powers of executive authorities match functions performed by them?

Do executive authorities exercise their rule-making powers effectively?

Is there a need that the law should regulate general issues related to the exercise of rule-making powers by executive authorities?

Does regulatory legislation regulate the promulgation of statutory and regulatory legislation?

Are there instances where people are not informed about delegated legislation related to human rights?

Commentary

The legislative function belongs exclusively to the parliament, which exercises it by passing relevant laws in various fields of public life. No other body is permitted to act as a substitute for a parliament, and not only by passing acts being superior to laws or equal to them but also by interfering in the subject matter of the legislative regulation, that is, by exercising rule-making powers with regard to issues that must be regulated exclusively by laws. If such powers are delegated to other bodies, in particular, to the government, such delegation must be of an exclusive and extraordinary nature, comply with the Constitution, be time-limited and accompanied by relevant parliamentary or judiciary oversight. It is the perspective under which one should assess both current and past practices under which powers have been delegated to the government to pass statutory decrees, some of which are valid even now.

With regard to the possibility of passing laws on matters which Article 92 of the Constitution did not include in the sphere of exclusive statutory regulation, it should be kept in mind that this list of issues set out in this article is not exhaustive. This means laws may also be passed on issues not provided for in that article of the Constitution whenever they are not part of the exclusive competence of other public authorities.

The legislation should be transparent and the procedures for publishing laws and informing people of them should ensure that persons at law be timely informed of the legal norms that have been adopted.

In the same fashion, executive authorities should exercise their rule-making powers (powers to issue regulatory acts) on the basis of the statutory law and exclusively with the purpose of exercising their powers.

Rule-making powers of executive bodies, as well as their limits, should be regulated exclusively by laws as the Constitution prescribes, for the reason of the indispensability of supervision over executive bodies regulating social interaction by secondary legislation and exercising discretionary powers, as these functions cannot be regulated by secondary legislation.

The officials of the public authorities should obtain permission to exercise their powers and their regulatory acts should be compatible with laws and regulate only such issues that are within the scope of powers of a relevant body. In particular, regulatory acts must not define human and citizen's rights and freedoms and their most important obligations. This stems from Paragraph 1 of Article 92 of the Constitution of Ukraine. If any piece of regulatory law contains provisions according to which human and citizen's rights may be defined by governmental acts or other types of regulatory law, it should be considered a direct violation of the Constitution of Ukraine.

The requirement of exclusive statutory regulation applies also to the procedure for the promulgation of statutory and regulatory legislation. If executive authorities have broad discretion, including rule-making powers, it is an indication of authoritarian regimes or dictatorships.

Regulatory law adopted by executive bodies (in particular, by their operating procedures and regulations) may regulate procedural issues related to the organisation and functioning of such authorities (procedures for the design, discussion and approval of regulatory law by a certain body). However, if this is a case, procedures should be transparent and compliant with the Constitution, laws and general principles of rule-making.

4. International and domestic law

Does the Constitution appropriately regulate the relationship between international treaties and domestic laws?

Is there a need for the Constitution to better regulate the relationship between international treaties and domestic laws?

Do domestic laws implement the principle of scrupulous compliance with the obligations of Ukraine taken under international law?

Are there clear rules in place as to the implementation of Ukraine's obligations taken under international law?

Is the specific procedure for the execution of judgments of the European Court of Human Rights effective if compared to national judgments?

Does Ukraine execute binding decisions of international courts related to the observance of human and citizen's rights?

Do the procedures for the enforcement of judgments need to be improved?

Should there be statutory regulation of the procedure for the domestic implementation of current international treaties signed by Ukraine which do not require to be ratified by the Parliament?

Do the provisions of international human rights treaties ratified by the Parliament have actual priority over the provisions of domestic law?

Is it possible to conclude an international treaty with provisions contradicting the norms of the Constitution?

Commentary

The principle *pacta sunt servanda* ("agreements must be kept") is a legal formulation of the principle of legality in international law. For this principle to be implemented, the national legal system should ensure that the state's international obligations under international treaties, including the judgments of international courts with the jurisdiction accepted by the state, be executed. This can be done by many ways. Normally, constitutions contain provisions on the relationship between international and domestic law. In particular, according to Article 9 of the Constitution of Ukraine, International treaties that are in force, approved as binding by the Verkhovna Rada of Ukraine (such approval is made in the form of passing a law which ratifies an international treaty), become part of the national legislation of Ukraine. This provision does not directly define the place of an international treaty in the hierarchy of legal acts and its only meaning is that such treaty is included in the system of domestic laws and is subject to direct application by domestic bodies which apply legal norms. This means that such bodies should not wait until the provisions of an international treaty would be transformed in the domestic legislative acts. They are obliged to apply them immediately after the ratified international treaty enters into force with due regard for the legislative mechanisms for the implementation of legal norms.

Contrary to the constitutions of many countries, Article 9 of the Constitution of Ukraine avoids the issue of interrelation between international treaties and national laws of Ukraine if there is a collision between them. That is why domestic legal literature includes different, and sometimes totally antagonistic, interpretations of this matter. The law-makers tried to regulate it by the Law "On the international treaties of Ukraine"; such an attempt does not seem entirely correct as these issues are usually a prerogative of a constitution and not of an ordinary law, which from the legal standpoints does not differ from any law on the ratification of an international treaty.

The views of the Venice Commission are decisive in terms of the clarification of this matter. The *Rule of Law Checklist* has a special section

about legality in the context of a relationship between international and domestic law (see II.A.3) where the solution depends on the answer to the following question: does the domestic legal system ensure compliance of the domestic law with the international human rights law including binding decisions of international courts? This means that the Venice Commission considers the issues of compliance of domestic law with international human rights treaties, and of domestic case-law with similar international case-law, as one of the most important indicators in assessing the state of the rule of law in a given country.

Let us, without going into a detailed analysis of the views available in the domestic literature on possible avenues to ensure such compliance, emphasize some important points that will help guide us in the process of resolving this difficult issue. Primarily, it should be said that the international legal principle *pacta sunt servanda* has an unconditional and absolute character exclusively in the sphere of the foreign relations of Ukraine (Article 18 of the Constitution of Ukraine). In accordance with the principle mentioned above, all categories of international treaties in force (any treaties concluded with any foreign state or another subject of international law, regardless of whether such treaty is contained in a single document or in several interrelated documents and of whether such treaty has a specific title of a treaty, agreement, convention, pact or protocol, etc.) should be observed by Ukraine in good faith. Being a party to an international treaty, a state cannot refer to its domestic legal norms as an excuse for failing to observe the relevant treaty (which is clearly indicated in Article 27 of Vienna Convention on the Law of Treaties of 1969, of which Ukraine is a party).

The extent to which Ukraine adheres to the provisions of international treaties in its foreign policy does not only reflect its integrity as an international partner but has a direct impact on the level of protection of Ukrainian businesses, environment protection, information exchange, industrial property protection, etc. With regard to domestic policy, the Constitution of Ukraine does not recognise the absolute primacy of any international treaty over each and every national law and regulatory act. Such primacy can be recognized only for international treaties of a certain type or rank, or those that, firstly, require approval by the

state through a special procedure (ratification) and, secondly, their implementation requires such domestic actions which, under modern international standards, cease to be exclusively an internal affair of the state, i.e., acquire a supranational and supra-territorial nature. Such domestic spheres include first of all guaranteeing human rights and freedoms; it is now undoubtedly recognised by many international legal instruments and constitutional doctrines and practices of most countries in the world.

It is absolutely compatible with the modern interpretation of the rule of law as a phenomenon which is inseparably linked to a human being, his or her rights and freedoms which are a universal value regardless of nations, ideologies, religions, etc.

The need to reinforce the legal protection of human and citizen's rights and freedoms adds relevance to the search for avenues to increase the positive impact of the international law provisions and to ensure that Ukraine executes judgments of international courts, in particular, the European Court of Human Rights. The state must clearly observe in its practice the primacy of the provisions of international human rights treaties ratified by the Verkhovna Rada of Ukraine over the provisions of national law. It is important to ensure in this respect that the observance of international obligations would not bring about parallel systems of the execution of judgments but would stimulate instead the fullest possible introduction of international human rights standards and reinforce relevant guarantees related to judicial protection of human rights within the domestic legal system.

The procedures for the execution of judgments of the European Court of Human Rights should be implemented as a part of the general procedure for the enforcement of national judgments in compliance with Article 129[1] of the Constitution of Ukraine which says that courts should execute control over the enforcement of judicial decisions. This will ensure the uniformity of judicial procedures, the administration of true justice and the attainment of its ultimate goal which is the protection of human rights.

An opinion, widely known from the domestic literature (especially that on international law) and arguing that all provisions of international law have primacy over domestic legislation (and sometimes even the Constitution) finds no basis in the provisions of the Constitution of Ukraine and European standards, in particular, the views of the Venice Commission, which, in its *Rule of Law Checklist*, noted that international law "should not always have supremacy over the Constitution or ordinary legislation" (see II.A.3.48). It means that the Venice Commission, as well as other Council of Europe institutions, pointing at the "critical importance of the implementation of international law in the internal legal order" (see II.A.3.47), do not at all reject the principle of the state sovereignty, in particular, the right of the state to independently define (beyond the scope of universal multilateral international agreements) spheres where the provisions of international treaties have primacy over domestic laws in general or in part or do not have primacy at all. This can be done by various ways. One of the most common of them is when a separate law (another legal act) is adopted, implementing the provisions of an international treaty into national law, that is, reproducing them in the relevant act of domestic law. Quite often rule-makers apply the practice of inserting special conflict-of-law rules in the relevant laws to address conflicts between those laws and the provisions of a given international treaty. However, if conflict-of-law rules are introduced, this does not confirm the universal nature of the principle that the provisions of all international treaties have primacy over the national laws of Ukraine, as some domestic authors argue, but the independence of Ukraine in choosing approaches to address these issues as the manifestation of its sovereignty.

5. The level of the development of legislative procedures

Is the constitutional regulation of the Parliament's decision-making procedures sufficient?

Is the procedure for passing laws by the Parliament effective? Do the parliamentary procedures take due account of the rights of the parliamentary minority, ethical standards and integrity of parliamentarians?

Is there a law that adequately regulate the procedure for lobbying in the Parliament?

Is the process of drafting parliamentary acts transparent and effective enough?

Is the procedure for drafting, discussing, adopting and publicising laws regulated by the legislation to the necessary extent?

Do public authorities respect law-making procedures in an appropriate manner?

Does the law provide for timely and appropriate specification of legal regulation of social relationships?

Does the public participate in discussions regarding draft laws before they are submitted to the Parliament and does it have an impact on their adoption?

Are there procedures in place to integrate public opinion after discussing draft laws?

Are the most important draft laws made public to appropriately test them?

Are daft laws actually reviewed by experts to avoid ill-founded decisions?

Is there monitoring in place of the observance of law and a procedure for it? Is the monitoring effective enough?

Commentary

Legislative procedures are aimed at ensuring that representatives of people properly express their will. Therefore, such procedures should be democratic, transparent, effective and compliant with the Constitutions and the laws of Ukraine. The Constitution regulates only the fundamental elements of the organisation and implementation of legislative power and observance of parliamentary procedures. The Parliamentary Rules of Procedures should comprehensively regulate the parliamentary procedure; in most countries with the developed

democracy, they have the force of law although they are not always designed in the form of a law. There is no requirement as to the relevant control from the head of the state (a veto) over the rules of procedure as parliaments have traditional autonomy regarding the regulation of parliamentary procedures.

The procedures for parliamentary decision-making should, first of all, ensure that each parliamentarian effectively expresses his or her will, that the parliament exercises its supremacy in defining the content of laws; they should thoroughly regulate delegated powers as appropriate, reflect the respect for the parliament as the legislative body and for the legislative decision-making procedures by all holders of the right of legislative initiative and public authorities.

Appropriate procedures for legislative decision-making should also provide for ensuring rights of opposition, high ethical standards and, in particular, the integrity of parliamentarians themselves, as well as observance of relevant lobbying rules by all stakeholders. Lobbying is an important instrument for making and adopting public decisions, it is an integral element of pluralistic democracy, it establishes official and controlled channels of influencing parliamentary decisions to protect the interests of specific social categories within the legislative branch of government in accordance with the relevant standards and rules. If such standards and rules are violated, it decreases the legitimacy of the Parliament itself and of its decisions.

The public delegates its law-making powers to parliaments so it has the right to expect that parliaments make laws transparently, discuss the most important of them with the public and provide broad access to their drafts. The public has also the right to inform parliamentarians of their views when draft laws are preliminarily discussed in the committees of the Parliament and at parliamentary hearings, and to have an opportunity to make an effective impact on their adoption. The relevant procedures aimed at taking public opinions into consideration and established by law should serve this purpose.

The procedures for drafting, discussing, adopting and promulgating laws should be regulated by laws, as this stems from the Parliament's

important role in the rule-making work and the significance of procedures for such work.

The stage when laws are promulgated and enter into force should also be compliant with appropriate standards and serve the purpose of informing those concerned, in a proper manner, of the relevant requirements addressed to them.

The adopted legislation should be assessed from the perspectives of its timeliness, proper justification (responsiveness to the needs), rationality and the comprehensiveness of regulation. It is extremely important that, if comprehensive regulation is necessary, regulatory acts to clarify the Parliament's legislative decisions be approved timely. This should be addressed ty the preliminary comprehensive review of the drafts of legislative decisions and the procedures for their evaluation to prevent ill-grounded, internally inconsistent and technically and legally deficient legislative acts from being adopted. Parliamentary, research, expert and legal services, as well as academic institutions and individual scholars, can be involved in such review. It is important that the review be comprehensive (including legal, environmental, economy, anti-corruption expert reviews, sociological aspects, gender mainstreaming, compatibility with the EU law, etc.) and the scrutiny embrace all acts submitted to the Parliament.

Effective legislation includes also monitoring of enforcement of laws and assessment of their effectiveness, as well as the implementation of the mentioned above in the legislative work of the Parliament, which should be also reflected in parliamentary procedures. Such oversight could be possibly exercised as parliamentary oversight by its committees or as the monitoring of the enforcement of laws by the government. This being said, the latter very often is a lot more effective because it is the government that ensures the implementation of the main bulk of legislative acts and it has an opportunity to more comprehensively assess the profoundness and effectiveness of the implementation of relevant laws.

6. Legality under the state of emergency

Is the declaration of the state of emergency regulated by laws to the full extent?

Is the legislative regulation of conditions, under which declaration of the state of emergency is possible, compatible with the European practices?

Do the relevant laws protect from potential exceeding of authority (abuse of power) if the state of emergency is declared?

Does the law provide sufficient legality safeguards in a state of emergency?

Does the law provide sufficient safeguards for human rights and freedoms in a state of emergency?

Do the laws properly protect the right to life, health and security of a person in a state of emergency?

Do the laws properly protect the right to property in a state of emergency?

Do the laws properly protect the right to social security in a state of emergency?

Does the law provide sufficient guarantees of legal persons' rights in a state of emergency?

Does the law provide sufficient guarantees to foreigners, stateless persons and foreign legal persons in a state of emergency?

Are measures to be taken in a state of emergency proportionate?

Is there a parliamentary and judicial review of conditions for declaring the state of emergency in place?

Commentary

In a state of emergency (a special legal regime that may be temporarily imposed in Ukraine or in certain localities in the event of emergencies

of man-made or natural nature not lower than the national level, which have led or may lead to human and material losses, endanger the lives and health of citizens, or in the event of an attempt to seize state power or change the constitutional order of Ukraine through violence) domestic legal norms should remain in force to regulate, with sufficient comprehensiveness and in accordance with European practices, the exercise of power and guarantee respect for human rights in the implementation of measures to prevent such threats.

Such provisions should envisage an open and transparent process of declaring a state emergency to, first of all, ensure protection from possible excess of powers (abuse of power) during its declaration. To this end, the law should provide for the distribution of powers and define what changes are impossible to be made in a state of emergency. In, particular, powers of the President of Ukraine, the Verkhovna Rada of Ukraine, the Cabinet of Ministers of Ukraine, the Ukrainian Parliament Commissioner for Human Rights, the Verkhovna Rada of the Autonomous Republic of Crimea, the Council of Ministers of the Autonomous Republic of Crimea, ministries, other central and local authorities and self-government bodies, courts, prosecutorial bodies of Ukraine, bodies performing operational and investigative activities and pre-trial investigation must not be, respectively, suspended or restricted.

The legality safeguards in a state of emergency are the following: prohibition to amend the Constitution of Ukraine, the Constitution of the Autonomous Republic of Crimea and election laws, hold elections of the President of Ukraine and the Verkhovna Rada of Ukraine, Verkhovna Rada of the Autonomous Republic of Crimea and local self-government bodies, national and local referenda and limit the rights and powers of the members of the Parliament of Ukraine. The term of office of the representative bodies of local self-government, the Verkhovna Rada of the Autonomous Republic of Crimea, and the Verkhovna Rada of Ukraine should be extended for the period of the state of emergency if expired.

Legal norms on the declaration of a state of emergency should provide for the protection of the right to life and health, liberty and security

of person, right for property and social security in a state of emergency. The legislation in force (and in particular, Article 22 of the Law of Ukraine "On the legal regime of the state of emergency", dated 28 December 2015) contains, to this end, the provision that limitations of constitutional rights and freedoms envisaged by it which can possibly be applied in a state of emergency are exhaustive and not subject to any broader interpretation.

The term for which they are applied must not exceed the term of the state of emergency. It is prohibited to impose any other restrictions. It is equally important that human and citizen's rights and freedoms (including those of foreigners and stateless persons) established by part 2 of Article 64 of the Constitution of Ukraine (in particular, equal constitutional rights; the right to citizenship; the right for the respect of human dignity; the right for freedom and security of person; the right to appeal; the right to housing; the right to judicial protection; the right to compensation, at the expense of the State or bodies of local self-government, for material and moral damages inflicted by unlawful decisions, actions or omission of bodies of state power, their officials and officers, etc.).

The legislative norms should also ensure that any derogations from human rights due to the requirements of a state of emergency, its duration and conditions, be proportional. They should identify limits within which human rights (including the rights of foreigners and stateless persons) and the rights of juridical persons cannot be further restricted. Therefore, it is important that the purpose of the declaration of a state of emergency is upheld, as it should be applied to avert existing threats to the state and cannot constitute grounds for applying tortures or cruel or degrading treatment or punishment, for any restrictions of the right to life, to freedom of expression, freedom of thought, conscience and religion, within the understanding of these rights and freedoms by the International Covenant on Civil and Political Rights and the laws of Ukraine (Article 24 of the Law of Ukraine "On the legal regime of the state of emergency").

Guarantees of observance of personal rights and freedoms of citizens are extremely important. The parliamentary oversight and judicial

review, as well as other forms of oversight, and the supervision over the conditions of the state of emergency and restrictions applied in it serve as guarantees when a state of emergency is declared. The current legislation does not contain any detailed characteristics of those forms of supervision, therefore, general modes, principles and mechanisms of parliamentary oversight, judiciary review and other forms of review and supervision should be applied in a state of emergency.

7. The status of compliance with the legislation

Is the legislation focused on encouraging voluntary compliance with its requirements by individuals?

Are there sufficient mechanisms to prevent violations of law by public authorities, local self-government authorities and its officials?

Are there sufficient mechanisms to prevent violations of law by individuals?

Do officials and state and local self-government authorities duly comply with the legal requirements?

Is the judicial review of compliance with law effective?

Is there a proper level of legal order in the country?

Does the level of compliance by individuals with legal requirements meet modern needs (of a democratic state with the rule of law)?

Are there gaps or other deficiencies in the law enabling its violators to escape accountability?

Are there clear, comprehensible and proportionate legal sanctions for the lack of compliance with the law?

Is responsibility for violating law imminent in practice?

Are sanctions for violating laws in effect applied consistently?

Are administrative procedures intended to prevent violations of law effective?

Commentary

Laws should be complied with. This axiom makes sense in a democracy only when the law promotes strengthening the foundations of a free society, protection of individual rights and freedoms, development of a market economy and when such nature of the law is matched with legal tools in the form of dispositive regulatory methods to encourage voluntary compliance with the law; the effectiveness of the law should rely upon regulatory mechanisms – of discretion, not condemnation – and not on the need to enforce its provisions by compulsion. Assessing law from such perspective could reveal whether it is progressive or repressive in nature and whether compulsive elements take precedence over encouragement to voluntary compliance with it.

According to the equality principle, the requirement to comply with the law is binding on everybody to whom it applies. However, there are important differences in the instruments intended to legally regulate the conduct of individuals, on the one part, and public authorities and its officials, on the other, as public officials are delegated with powers of authority, the destiny of individuals depends on them, and their compliance with the law is of special importance.

While citizens should not be forced to do what the law does not prohibit (the regulatory method of general permission), Article 19 of the Constitution of Ukraine prescribes that bodies of state power and bodies of local self-government and their officials are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine (regulatory method of special permission). Therefore, laws should contain sufficient tools to prevent public authorities, local self-government bodies and their officials from violating the law.

As public authorities, local self-government bodies and their officials bear special, enhanced responsibility for compliance with the law, laws should contain clear provisions to define with due comprehensiveness the powers of public authorities and local self-government, as well as clear and personalised liability for committing offences.

Such necessary effective legal instruments intended to bring to justice the offenders when public authorities, local self-government and their officials, as well as individuals, violate the law, should not be an objective per se but finally serve the purposes of legal regulation and due state of compliance with the legal norms.

The regulation of public relations on the basis of the legislative requirements is embodied in the real legal order, the assessment of which helps at the same time to assess the effectiveness and efficiency of relevant legal mechanisms. If the level of compliance with the legal requirements by individuals is compatible with the current needs and requirements of a democratic state based on the rule of law, this means that the legal order is adequate. Vice versa, mass violations of law demonstrate either its incompatibility with the level of public conscience or its repressive nature.

The law should regulate, in the most comprehensive manner, bringing individuals to justice if they violate its requirements. If there are gaps or inconsistencies, ineffective or complex procedures for bringing perpetrators to justice, it nullifies the regulatory properties of law, enabling offenders to escape sanctions.

If sanctions for specific offences lack proportionality or clarity, they in the same fashion allow escaping liability, do not ensure imminence of responsibility for violation of laws and result in selective justice and violations of law when judgments are passed.

Administrative procedures for consideration of citizens' appeals and settlement of disputes play an important role in preventing violations of law in democracies. Such procedures are not yet introduced in Ukraine to the extent necessary (in particular, it is about the need to approve the Code of administrative procedures) and the existing ones have numerous deficiencies and fail to ensure high standards of human rights protection from arbitrariness of the state, contradicting therefore to the purpose of consolidation of the rule of law principle. It is thus important that the effectiveness of existing procedures be assessed to have them further improved.

LEGAL CERTAINTY

The legal certainty means primarily, as a component of the rule of law, the requirement that the grounds, purposes and content of legal norms, and first of all of those of them that directly address individuals, be clear. A person should have the possibility to envisage the legal consequences of his or her conduct. Experience has shown that the absolute certainty of such consequences is unattainable due to a number of circumstances: the specificity of the language used to formulate legal norms, their general nature, impossibility to envisage beforehand all real-life situations, etc. Any law seeking to regulate human conduct and identify the consequences of such conduct with excessive severity of formulations quickly becomes "petrified" or outdated. But the law should be able to adapt to evolving circumstances.

The legislative process is rather slow, so there is no need to hope for quick amendments to the law.

In this regard, an important role in the implementation of legal certainty belongs to the application of rules and especially to jurisprudence, capable of overcoming such uncertainty through interpretation.

The requirements of legal certainty go beyond clearness, preciseness and consistency of laws and regulatory acts and include the following:

- consistent and impartial application of the legal provision, that is, ensuring that the application of norms and especially jurisprudence is internally harmonised;
- adherence to the *res judicata* principle which means that final judgments must not be reviewed save for instances clearly established by law and resulting from exceptional circumstances;
- binding nature of judgments and their strict enforcement.

The abovementioned concerns also the decisions of all public authorities (save for judiciary) and local self-government.

One of the important elements of legal certainty is the requirement to protect trust. This requirement focuses on specific aspects of legal certainty of special importance for the consolidation of the rule of law.

Such requirements provides, in particular, for the following:

- the confidence of a person that his or her legal status remains stable and will now get worse in the future;
- the openness of actions of public authorities and local self-government and their officials;
- the stability of law and predictability of its development;
- respect by the state of *legitimate expectations*, which means that the state complies with the responsibilities it has taken vis-a-vis its citizens (for example, compliance with the criteria for salaries provided for by law in employment or the observance of a convict's right to be released from punishment or to be early released from serving a sentence in criminal prosecution, etc.);
- legal provision for the impermissibility of *reformatio in pejus* which means worsening of the legal status of an individual appealing against any decision on his or her legal accountability (for example, when a higher court imposes more severe sanction to a defendant appealing a sentence of a lower court or when an administrative or disciplinary sanction is severed upon considering an appeal against decisions of relevant bodies or officials).

One of the most important elements of the protection of trust forbids ex post facto laws.

The *lex ad praeterian non valet* principle goes back to the formulae of the Ancient Rome jurists seeking to counter the arbitrariness of law-makers who made retroactive laws worsening the status of individuals and exposing them to adverse consequences for actions recognised as lawful when committed. The purpose of this principle is to put an end to infringements of human rights and freedoms by the state. Such

focus makes this principle an important guarantee of the security of a person and his or her trust in the state.

It should be mentioned that exceptions to the principle lex ad praeterian non valet concerning laws and regulatory acts, which are formulated in Article 58 of the Constitution of Ukraine, are related, according to the tradition (and not the domestic one only), exclusively to instances "when they mitigate or eliminate the responsibility of the person."

1. Clarity and foreseeability of legislation

To what extent are new legal acts harmonised with current acts?

Does a legal act include definitions, concepts or legal constructs which are new for domestic legislation?

Are the provisions establishing new rules of regulation comprehensible and intelligible for individuals?

Do definitions and concepts applied in a legal act have the same meaning throughout its text?

Does a legal act create gaps in the legislation?

Does a legal act result in legal controversies? If so, does it provide instruments to eliminate controversies?

Does a legal act include final and transitional provisions?

Do transitional provisions establish *vacatio legis* sufficient for a legal act to take effect to ensure that all stakeholders have an opportunity to be aware of it and adapt to new regulatory conditions/rules?

Does a legal act provide for the annulment of previous acts which regulated relevant relations?

Commentary

The foundation for the principle of legal certainty is the formal certainty of the content of legal provisions. The formal certainty of legal

provisions has its external and internal aspects. The external aspect is related to textual legal technique requirements and the internal one is related to the substance quality of the content of a legal act.

Legal acts and other written sources of legal norms should comply with certain standards, rules and methods of designing legal texts.

Among the requirements for the content of legal norms the following are being referred to: intelligibility, comprehensibility, clarity, unambiguity, the impossibility of limitless interpretation, formality, brevity, official nature, conciseness, exhaustiveness, etc. In compliance with these requirements, legal norms reflected in a text of a legal act should be interpreted and applied in the same manner, be comprehensible and clear.

Clearness means that legal provisions are understood and therefore interpreted and applied in the same manner. Such characteristics as unambiguity and conciseness of formulations are to be applied to provisions of regulatory acts. The linchpin of the unambiguity requirement is that any text should use concepts that have a clear general meaning, are unequivocally perceived and understood.

The main requirement for legal acts in terms of unambiguity of their provisions, as well as of clarity, are related to the usage of words and terms in the text of such acts. In particular, words used in legal texts, should be used in their general, usual and everyday meaning. Preference should also be given to words that are traditionally used in the language in which the text of the act is written.

To ensure unambiguous understanding of the provisions of law the use of archaisms, historicisms, dialect, jargon and foreign words should be avoided.

Special attention should be paid to applying terms in the text of a legal act. Legal provisions regulate all the most important social interactions, and each sphere of social life has its own terminology. Therefore, in order to formulate legal provisions, special (inherent in certain field of science, technology, art, etc.) and legal (typical for jurisprudence) terms should be used which require that their content be described.

Traditionally, the terms used in legal acts, are classified into the following groups:

1) commonly used terms;
2) commonly used terms having a narrower meaning in a given act;
3) proper legal terms;
4) technical terms.

Commonly used terms are common, widespread names of phenomena, actions, objects that have a neutral meaning and are used both in everyday language and in fiction, scientific literature, legislation. In legal acts, such terms are used in a general sense and do not acquire a special legal meaning. Such terms are used without accompanying definitions.

Commonly used terms that have a narrower, special meaning in a legislative act are such concepts that for the purposes of legal regulation acquire special, clear and precise meaning in a regulatory act and, accordingly, they are accompanied by certain definitions in the text of the act. These terms are, for example, "family members", "contract", "housing", etc.

Proper legal terms are those that characterize a certain legal concept and, as a rule, are defined by jurisprudence, or they are created by rule-makers themselves when the legal language lacks words to define the phenomenon. Such terms (impeachment, mortgage, leasing) are always used with definitions.

Technical terms are words borrowed from the fields of special knowledge: engineering, medicine, economics, etc. This group of terms partly includes the so-called "professionalisms" or words and expressions inherent in the language of a certain narrow professional group of people. Professional jargon can be used in legal texts without appropriate definitions if such terms are interpreted unambiguously and clearly in the relevant field of science. However, it would be inappropriate to use technical terms in legal acts without a proper description of their concepts as such documents are addressed to all those who use law.

Technical terms are appropriate in instructions, methodical recommendations and other documents addressed to a narrow circle of specialists in a certain field of science, technology, art, etc.

Such concept as "clarity" is realised through the simplicity and intelligibility of a legal act. The degree of simplicity and clarity of a legal document is determined on the basis of who it is intended for and what area of social interaction it regulates. The requirement to refrain from the use of complex special terms applies to legal acts regulating the most important areas of social relations (laws) and/or broad areas of public social relations, and to all or a large number of persons who do not have certain (professional) characteristics. Acts regulating a rather narrow sphere of social relations and being addressed to a certain, clearly defined group of individuals (for example, postal service rules, the rules of transportation of goods by rail, etc.), may use special terms and complex text.

It is unacceptable to use abstract formulations in the text of a legal act, such as "decisively improve", "increase attention". Words related to particular occasions or those that acquire meaning and content within a given context: "here", "I", "yesterday", "tomorrow", "now", etc., should be avoided.

Thus, individuals will interpret and apply in the same way a legal act where legal norms are expressed clearly and with simple grammatical constructions by using words in their general meaning. Clearness means that legal norms are understood and therefore interpreted and applied unambiguously.

An important procedural requirement is *vacatio legis or providing enough time for the legal relations to be changed as a result of passing a new law.* It is advisable to change the content of legal provisions with a prior warning about it as they should not come into force so soon that there would be no time to adapt to the new legal status. Furthermore, laws should include provisional articles to facilitate changing old rules to new ones and enable individuals to adapt to changes. An optimal balance should be struck in a specific situation between the principle of *legitimate expectations* and the interest of the state in the immediate

implementation of a new law. Whenever the immediate effect of any act may cause significant harm to the interests of individuals and would require significant efforts to quickly modify the legal relationship while such modification does not stem from an adequate public interest, the lawmakers should resort to giving laws a restorative effect. In many situations, the widespread practice when laws enter into force since their publication, is not compatible with the principle of legitimate expectations. Under such circumstances those whom the law is addressed to lack the opportunity to be aware of it in due time and make changes in their conduct accordingly. Such a situation does not promote the stability of legal regulation.

2. Accessibility and stability of legislation

In what manner a legal act will be/was promulgated?

Is it compatible with the existing procedure for the promulgation of legal acts?

Will the legal act be published or was it published in appropriate official sources?

Is the legal act published in official Internet resources?

Can official electronic resources be downloaded easily and quickly enough?

Is there a certain time gap between the publication of the legal act and its entry into force?

How often was the legal act amended? Were such amendments well-advised and justified?

Were the amendments consistent, didn't they contradict already existing provisions of legal acts?

Does a legal act provide for a mechanism of protection from amendments during a sufficient time period?

Commentary

Article 57 of the Constitution of Ukraine contains a requirement pertaining to the principle of legal certainty as it guarantees to everybody that he or she knows his or her rights and obligations, the lack of which would make impossible the implementation of the principle of equality, legal certainty and security. It is obvious that there would be no predictability of legal provisions if laws and regulatory acts establishing rights and obligations of citizens are not communicated to people in the manner prescribed by law. Part 2 of Article 57 of the Constitution establishes the obligation of the state to inform people about new legal acts.

Communication or publication can be done in different ways due to modern communication means. The concept of promulgation of a legal act is interpreted ambiguously in the literature. It is most often understood as communicating a legal act to the public which could be done in a number of ways. Such ways can be: official publication, publication in other printed media, announcement on radio and TV, mailing to public bodies, officials, enterprises, institutions, organisations, etc. Official publication is the major method of promulgating laws. It is the legally regulated communication of the full and exact text of the adopted law in the official publication, that is, in a specially designated print media. Other forms of promulgation are subsidiary as a rule.

The procedure for the publication of legislative acts in our country is established by the Decree of the President of Ukraine "On the procedure for the official publication of legal acts and their entry into force." According to this procedure, the laws of Ukraine are subject to publication in Ukrainian in the following official printed media: "Official Gazette of Ukrainy", "Vidomosti Verkhovnoi Rady Ukrainy", newspapers "Uriadovyi Kurier" and "Holos Ukrainy". Acts of the Verkhovna Rada may also in some cases be officially announced on television and radio. The official bulletin, where laws and acts of the President of Ukraine are published, is also the information bulletin "Official Gazette of the President of Ukraine".

In times of electronic means of communication, the official sources where legal acts are published are the resources of public authorities and local self-government, in particular, the resource www.rada.gov.ua.

At the same time, it should be mentioned that the Constitution of Ukraine (Article 57) requires that people be informed of laws and regulatory acts that define the rights and obligations of an individual under the procedure established by law. This means that laws should establish procedural aspects of promulgation and publication and define their official sources. It is an important condition under which the state should ensure that individuals be aware of laws and regulatory acts and therefore their legitimate expectations and legal certainty be ensured. However, these matters have not yet been addressed by law in Ukraine and the issue of compliance with the Constitution of Ukraine of the mentioned Decree of the President of Ukraine has not been raised before the Constitutional Court of Ukraine.

It should be noted that the Constitution of Ukraine does not define what is meant by the promulgation of the law. The rule-making practice in Ukraine solidly affirms that laws themselves determine terms of their entry into force, defining such terms as publication and not promulgation. In the practice of the Verkhovna Rada of Ukraine, few laws can be ascertained that do not specify the time of their entry into force (excluding laws on ratification of international treaties), and only such laws are subject to the provision of part 5 of Article 94 of the Constitution of Ukraine requiring 10 days since their official publication.

When new legal acts are adopted or existing acts are amended, their consistency with existing documents should be taken into account. It should be mentioned to this end what acts cease to have an effect due to the adoption of new ones and whether they contradict each other or create legal conflicts or gaps.

3. Compliance with the principle of legitimate expectations when laws and regulations are adopted

Does the legal act improve the legal status of an individual?

Does the legal act provide for the legitimate expectations of all stakeholders that their legal status would not be worsened following the adoption of the act?

Doesn't the legal act result in a situation when the improvement of the legal status of some individuals leads to the worsening of the legal status of others?

Doesn't the legal act narrow the content and scope of already existing rights? Doesn't the legal act introduce a more complicated

mechanism for the implementation of existing rights?

Doesn't the procedure for the implementation of rights minimise in fact their sense and meaning?

Does the legal act include retroactive provisions? If so, doesn't such provisions worsen the legal status of individuals?

Does the legal act provide for instances when retroactive provisions are applied?

Are the instances when retroactive provisions are applied compatible with international practice?

Commentary

The principle of legitimate expectations of a person is one of the elements of the general principle of legal certainty. It means that public bodies should comply with their promises and legitimate expectations and not only with laws and regulations.

In accordance with the legitimate expectations doctrine those who act in good faith and on the basis of the law as it is should feel no frustration as to their legal expectations. However, new situations may be a sufficient ground for legal changes that could result in the feeling of failed expectations, although this may take place only under exceptional circumstances.

The general rule says that if a person has a certain right or interest, or legitimate expectations, he or she cannot be deprived of opportunities

for their implementation. This means that the rule-making body should ensure that such provisions be adopted which comprehensively promote human rights implementation and do not deny their implementation or dilute (minimise) their sense. When new legal acts are adopted, it is unacceptable to narrow the content and scope of existing rights and worsen the legal status of individuals.

Currently, the compatibility of secondary law with primary law is extremely important. The problem is that often secondary law, contrary to its main purpose to clarify legislative norms, establishes such legal norms, which in fact do not supplement the provisions of law, but prescribe, contrary to the law, certain additional conditions for the conduct of a person at law aimed at narrowing the content and scope of human rights. In other words, they actually violate human rights.

It is important that an individual should not only hope, on reasonable grounds, that the state would act in a stable and predictable manner, which means that public authorities and local self-government act lawfully, but he or she also should, from the legal perspective, act in a good faith, that is, act within the established legal order and not violate the law. If a certain order established by the state is violated, an individual should not have any legitimate expectations, as he or she is acting illegally.

A distinction is made between legitimate expectations in their substantive and procedural meaning. Substantive legitimate expectations of persons at law should be protected from unexpected changes of legislation that establish a certain legal regime (of property, investments, etc.). Procedural legitimate expectations relate to the same and consistent application of law and avoiding selective justice. Therefore, the requirements imposed on the state in this context can be divided into requirements for rule-making (non-permissibility of frequent, inconsistent and unpredictable amendments of legal acts) and requirements for the application of the law.

The issue of the action of a legal act is also important. As a rule, a legal act (its validity) is *prospective* in nature, that is, looks at the conduct of persons at law after the act has entered into force. This is related to the

important legal principle which says that legal acts are not retroactive, that is, do not apply to relations occurred before the act has entered into force.

However, legal acts can be retroactive (*ex post facto*) acts. It happens when a legal act formulates certain additional rights, that is, improves the legal status of an individual and does not establish new legal restrictions.

Article 58 of the Constitution of Ukraine prescribes that laws and regulatory acts are not retroactive save when they mitigate or nullify the liability of an individual. This means that the Constitution of Ukraine uses such retroactivity definition that is rather narrow and related to the liability of an individual. Instead, the retroactive nature of legal acts can be applied in a significantly broader manner to justify the improvement of the legal status of an individual.

4. The status of the legislative provision of (compliance with) the principles of legal responsibility

Does the law create new types of offences? If so, does it prescribe legal responsibility for them?

Is the creation of new types of offences and responsibility for them compliant with the Constitution and the rule of law, as well as with the principles of rationality and necessity?

Doesn't the law create a situation where a new offence is established without identifying a legal responsibility for it?

Is this compatible with the principle "no crime and legal responsibility for it without law"?

In what manner is it compatible with Article 92 of the Constitution of Ukraine (the establishment of offences and legal responsibility only on the basis of law)?

Are the type and scope of legal responsibility for a given offence proportional and fair?

How clearly is legal responsibility defined so as not to result in a wide (arbitrary) interpretation of the law and in abuses by the bodies that apply the law, in particular, the judiciary?

Do the regulatory acts comply with the legal requirements regarding the types and corpus delicti of offenses and the types of legal responsibility for them?

If new/additional types of responsibility for existing offences are established, in what manner is it compatible with the principle that does not permit to prosecute twice for the same offence (*ne bis in idem*)?

Commentary

Of importance is the description of laws containing rules, the violation of which qualifies as an offense. On the one hand, this applies to clarity, preciseness, comprehensibility and the lack of contradictions between its provisions, and on the other, the rule establishing the prohibition must have all the characteristics of a legal norm. If these prohibitions established by such a clear, comprehensible and socially accepted norm are not complied with, the society will have no doubts about the qualification of such acts as offences, as well as arguments to justify the violation of such prohibitions by ideals of justice, human rights, etc., if such prohibitions are accepted by people as directly protecting their rights.

According to Article 92 of the Constitution of Ukraine, only the laws should define actions that are crimes, administrative or disciplinary offences, as well as liability for them. It means that secondary law cannot establish offences. The exception to this is civil offences which, by the nature of civil law relationships, may reflect in the violation of contractual obligations agreed by parties to a contract. However, only law can define the foundations (principles) of the legal responsibility for civil offences.

Legal responsibility can be imposed only for the violation of legal norms, the list and essence of which should be formulated and reflected in laws. If the law defines no type and measure of legal responsibility

for a given offence, no legal responsibility can be incurred. Therefore secondary law cannot establish legal responsibility. Such an approach is justified by the fact that legal norms established by laws are as formalized (defined), clear and understandable as possible, contrary to other methods of making rules, and the law itself is an act of higher precedence compared to other legal acts (except the Constitution). The opportunity for passing laws by the Verkhovna Rada of Ukraine, the highest representative collegial body, according to appropriate procedures or by a national referendum, should ensure the balance and stability of the legal basis for legal responsibility and their legitimation by society.

In the Constitution of Ukraine, such an approach to determining the legal grounds for responsibility is reflected in paragraph 22 of part 1 of Article 92, which establishes that only the laws of Ukraine determine the principles of civil law responsibility as well as actions that are crimes, administrative or disciplinary offences, and responsibility for them.

The principle of lawfulness of the grounds for legal responsibility is based on the *nullum crimen, nulla points, sine lege* ("no penalty and no crime without a law") postulate known from the times of Roman law. However, the very fact that a statute as a type of a legal act establishes grounds for legal responsibility is insufficient. The corpus delicti of the offence for which legal responsibility may be incurred and the type and extent of such responsibility should be formulated by statutory law with the highest possible certainty and comprehensibility for everybody.

The prohibition to prosecute twice for the same offence is enshrined as a principle in Article 68 of the Constitution of Ukraine. Such a prohibition directly indicates that the same type of legal responsibility cannot be applied twice for the same offence. Such a principle does not exclude the possibility of imposing additional types of legal responsibility on an individual. For example, an obligation may be additionally imposed on a person sentenced to imprisonment for a crime not to engage in certain activities after serving his or her sentence and/or to compensate for the damage incurred.

Legal responsibility should be distinguished from other coercive measures that may be imposed by the state. In particular, temporary restriction of the rights of an individual whenever prescribed by law as a preventive measure against possible offences and to enable the investigation of an offence, to protect the rights and interests of human beings and the society, is not considered legal responsibility. Such coercive measures may include, but are not limited to: taking a person into custody, restricting a person's freedom of movement, a holt of production, a ban on the sale of products, work performance, etc. If deficiencies pertaining to economic activity are corrected, the guilt of the suspect is not proved, threats to human rights and interests are eliminated, as well as in other cases prescribed by law, the above-mentioned coercive measures should be cancelled.

In the same manner, measures to restore a right of an individual that has been violated is not a legal responsibility. Such measures may include a decision by a competent authority to reinstate an employee after unlawful dismissal, repayment of the debt, eviction from illegally occupied premises, etc.

5. Conditions for ensuring legal certainty

What public authority drafted the legal act? Has the legal act been agreed with all interested public authorities and civil society institutions?

Do the procedures for drafting the legal act comply with the procedures prescribed by law?

Has the legal act been approved under the existing procedure?

Has the draft of the legal act been the subject of examination in terms of its compliance with the rule of law requirements, for example, those developed by the ECtHR case-law?

Has the draft of the legal act been the subject of a public discussion?

Does the draft of the legal act include the glossary in its introductory section with definitions of terms and concepts?

Are the definitions of terms and concepts understandable and unambiguous for a perception (by an ordinary individual or a legal professional)?

Does the text of the draft legal act comply with the requirements of legal technique (rules defining the usage of legal terms and constructs)? Has the legal act been subject to linguistic review?

Does the text of the legal act comply with linguistic rules (grammar, punctuation, etc.)?

Are the different parts, sections, articles of the legal act consistent with each other, by their logic, structure and substance?

Commentary

It is important that a rule-making body have relevant competence, under the Constitution and laws of Ukraine, to adopt legal acts of a certain form and content. Each public authority should adopt acts in accordance with its powers under the principle of legality. If a relevant legal act is adopted beyond the scope of powers of the rule-making body, it could be a reason for declaring such act invalid (contrary to the Constitution or unlawful).

Rule-making bodies should adopt legal acts in compliance with the procedure prescribed by the Constitution and the laws of Ukraine. If procedural rules related to the adoption of a legal act have been violated, such act, as a result, can be declared invalid.

The development of a draft legal act should include agreeing on its content with all interested public authorities and officials. When a draft act is developed that establishes new legal norms significantly amending the regulation, it is essential that it be discussed at public hearings, other public events, and the public be informed to the fullest possible extent.

It is important for the quality of the text of a legal act that it be reviewed in various ways: in terms of linguistics to ensure the unambiguous understanding of terms and use of grammatical legal constructs, etc.,

and in terms of a legal review to comply with the rule of law and in particular, with the case-law of the European Court of Human Rights.

A legal act must have a logical structure and be divided into parts, sections, articles, items, etc. Besides, it should have all the necessary details and be signed by the person responsible for its implementation. All structural elements of a normative act must be harmonised, balanced, logically consistent, well-founded, and non-contradictory.

Certain rules for designing legal terms and constructs should be followed when legal acts are drafted. Legal terms used in the texts of legal acts should be clarified by definitions.

Legislative definitions are important as they exclude ambiguity and excessive repetition of words. The definition of a term should be included in a draft law if the vocabulary meaning of the word is unclear, too general or too narrow for the purposes of a certain draft law, or it has several meanings. It would not be also possible to avoid a definition if, in the opinion of the law-makers, the term is very important and therefore there should be no misinterpretation or doubts about the concept it defines. Furthermore, legal definitions are also necessary if the concept is formulated by words that are very often used in ordinary language and evoke numerous semantic associations. They are also necessary if a certain term is used in a specific meaning with due regard for the purposes of the draft law or is interpreted in different manners by jurisprudence and legal practice.

Certain rules should be respected when legal definitions are formulated:

- a definition should include main specific and generic characteristics of the term;
- a definition should be formulated by words, expressions and other terms the meaning of which is better known or understood than the meaning of the term itself;
- a legal definition should not include the term to be defined by it;
- interrelated terms cannot be defined one by another so that each term that is part of a description is entered earlier or explained later.

The use of "international" legal language, or words of foreign origin commonly used among professionals, may be justified if three mandatory conditions are complied with:

1) if such terms and expressions define in the best way and correctly the relevant notions;
2) if they are rooted deeply enough in the international legal vocabulary, they are stable and their use is motivated;
3) if their meaning is clarified in the act itself.

If precision is sought then the following recommendations should be followed concerning the use of foreign words:

- foreign words should be used only when it is not possible to substitute them with the Ukrainian equivalents with the same meaning, that is, when they are terms;
- it is better not to use in the texts of documents such foreign words that have equivalents in Ukrainian: "*vidpovidnyi*" and not "*adekvatnyi*" ("adequate"), "*terminovyi*" and not "*ekstrennyi*" ("urgent"), "*vidshkoduvannia*" and not "*kompensatsiia*" ("redress"), "*nebazhanyi*" and not "*odioznyi*" ("odious", "unwelcome"), "*mistsevyi*" and not "*lokalnyi*" ("local");
- use such foreign world that either are internationally acceptable or do not have any equivalents in Ukrainian: "*blank*" ("form"), "*kredyt*" ("credit"), "*delikt*" ("tort, delict"), "*dispozytsiia*" ("disposition"), "*patent*", "*instruktsiia*" ("instruction"), etc.;
- foreign words should be used with the same meaning with which they have been borrowed and only when it is impossible (or undesirable) to substitute them with Ukrainian equivalents;
- it is not recommended that a word borrowed from other languages and a proper Ukrainian word be used in the same text to define the same concept (as synonymy in normative documents is limited); you should choose one option only;
- refrain from excessive use of foreign words in one sentence as it may complicate the understanding of its content.

It's worth indicating some important challenges for the understanding of legal texts arising from translations of foreign documents. Such an issue is extremely relevant for Ukraine in the context of future processes of European integration.

If legal systems are similar, it is easier to translate, however, linguistic affinity does not make it easier for the translator to do his or her job if legal systems significantly differ. To preserve the legal content, legal texts should always be translated from the original language and translations from other translations should be avoided. Profound special knowledge is needed to translate legal texts, therefore such texts are often translated by legal professionals and not by professional translators. Since legal translation often requires that the terms of one legal system be adapted to another, new challenges, accordingly, arise as translators should be aware of semantic differences between terms in different languages.

It is important to note that legal terms should be restored and constructed in Ukrainian legislation on a domestic basis, under national legal and linguistic traditions and with due regard to particular aspects.

Certain requirements should be adhered to when a legal construct is created. Such a construct should:

- precisely and fully cover those provisions and articles of the law, whence it proceeds;
- be coherent and systemic, compatible with other legal constructs proceeding from other provisions and articles of the law;
- be compatible to the fullest possible extent to the purposes of law and legislation;
- be clear, simple, easy to be understood and implemented.

At the same time, rule-makers should search for better ways of understanding extremely complex legal realities and expressing them in law, as poor quality or excessive legal constructs may have complex, dangerous and tragic consequences. Therefore rule-makers should be aware that creating legal constructs is a difficult and demanding job requiring special attention.

6. Compatibility of legal practice with the law

Is there a well-established practice of applying provisions of the legal act?

If so, is the legal act compatible with the well-established and generally accepted application of the law, in particular, the jurisprudence?

Is the practice of applying the legal act harmonised?

Has the Supreme Court adopted model decisions on the practice of application of the legal act?

Is such practice compatible with the principle of uniformity of law application practice and, in particular, jurisprudence?

To what extent judgments on the application of the legal act's provisions are being enforced?

Does this practice correspond to the *res judicata* ("matter decided") principle?

Did the Constitutional Court consider the issue of compatibility of the provisions of the legal act with the Constitution or constitutional complaints regarding the application of the provisions of the legal act?

Are there applications to the ECtHR or ECtHR judgments on applying the legal act's provisions?

If there are relevant ECtHR judgments, has Ukraine executed individual and general measures under the Law of Ukraine

"On the execution of ECtHR judgments and the practice of Implementation of the European Convention for Human Rights" aimed at eliminating deficiencies and contradictions of the valid legal act?

Commentary

Expressions and terms which have ambiguous interpretations or are value judgments are inherent to legal texts. Authorities that apply law and, in particular, the judiciary play a great role in eliminating uncertainty in applying such provisions of legal acts. Therefore significant

role is played also by legal professionals in ensuring that legal practice complies with the requirements of legal acts. A particular role is played here by the case-law.

Such case-law should be harmonised with the whole legal system and, in particular, be compatible with the principle of the uniformity of case-law. As social interaction rapidly evolves, the judiciary should address very complex challenges. It must decide on matters which have never been on the agenda and haven't required legal regulation.

An important aspect of legal certainty in judicial work is the requirement that legal provisions should be applied in the same manner. It is natural that legal norms cannot be interpreted and applied in one manner today and in a certain place, and in another manner tomorrow and in another place. The state, and, in particular, the judiciary, is obliged to adhere to the chosen legal position and refrain from deviating from it until there are solid and justified reasons to amend it and turn to a new understanding of a particular rule. Such grounds may, in particular, arise if errors in the interpretation or development of law are revealed, social relations change significantly, legal views and methodological approaches are reformed or acts of higher precedence are adopted.

Under paragraphs 4 and 5 of part 4 of Article 17 of the Law of Ukraine "On the Judiciary and the Status of Judges", unity of judicial practice and mandatory nature of judgments on the territory of Ukraine ensure unity of the system of judiciary. Decisions of higher judicial bodies, in particular, the Supreme Court, should be a guideline for ensuring unity of judicial practice as they are authoritative and significant for the development of judicial practice.

Another effective mechanism for ensuring unity of judicial practice and accelerating the consideration of certain categories of cases, and therefore lessening the workload of courts, is the introduction of standard and model cases in administrative proceedings, which certainly helps to eliminate legal uncertainty.

EQUALITY BEFORE THE LAW AND NON-DISCRIMINATION

Contrary to some other components of the principle of the rule of law, this principle is, as a rule, enshrined in constitutions. The Constitution of Ukraine is no exception to this rule. Under part 1 of Article 24 of the Constitution citizens of Ukraine have equal constitutional rights and freedoms and are equal before the law.

First, this means that they are equal in terms of their rights and freedoms regardless of their place of birth and residence, the colour of skin, political, religious and other beliefs, sex, ethnic and social origin, property status and other grounds. No privileges or restrictions on such grounds are permitted.

Second, any law (regulatory act) should be applied to various individuals in the same manner. Nobody can be privileged or, vice versa, discriminated on the grounds mentioned before. It is the consequence of the concept of uniformity. Equality before the law is especially important when the same grounds for liability or sanctions for violation of the law are applied.

Third, the principle of equality prohibits different treatment of the same situations and same treatment of different situations.

The latter requirement has become increasingly relevant as public authorities, local self-government and their officials need to ensure that internally displaced persons are not discriminated against in terms of their rights and freedoms.

Fourth, the principle of equality of rights and equality before the law prescribes also equal access to judiciary, equal rights in the process of administering justice: the right to express one's position, to enjoy equal rights of defence, etc.

1. Equal rights

Doesn't the adoption of the legal act result in a direct or indirect discrimination?

Does the legal act contain provisions clearly and unambiguously prohibiting discrimination?

Does the legal act institute mechanisms to prevent situations of discrimination?

Doesn't the legal act contain provisions discriminating certain persons at law on the ground of their status?

Doesn't the legal act contain provisions discriminating individuals in a certain territory?

Doesn't the legal act contain provisions discriminating individuals on religious grounds?

Doesn't the legal act contain provisions discriminating individuals on gender grounds?

Doesn't the legal act contain provisions discriminating individuals on political grounds?

Doesn't the legal act contain provisions discriminating individuals on the grounds of age?

Doesn't the legal act contain provisions discriminating individuals on the grounds of ethnic origin?

Doesn't the legal act contain discriminatory provisions in terms of languages?

Doesn't the legal act contain discriminatory provisions in terms of property status?

Doesn't the legal act contain provisions that discriminate on other grounds?

Commentary

Equality primarily means that persons at law are ensured to be equally treated by other persons at law and, in particular, public authorities (state authorities or local self-government, etc.). The uniformity does not mean here identical characteristics of certain persons at law or circumstances. It is not simply an arithmetic concept or a matter of textual logic.

The basis of this concept is a provision of equal opportunities for persons at law who apply to public authorities on certain issues. Because of this, equality of rights does not have a perfectly clear definition, as the concept of equality should take into account many different aspects which are the components of the equality of rights. The most relevant of them are the following: age, sex, language, property of the person at law, its lack or amount, political or religious beliefs, etc. The preamble of the Universal Declaration of Human Rights has such categories as "equal rights of all members of the human family". Many philosophers and thinkers of universal fame expressed such ideas before, however, the Christian doctrine has played the greatest role in the consolidation and promotion of the ideas of equal rights. In particular, Christ's commandment to love one's neighbour as oneself is the basis of the doctrine of the equality of rights as the appeal of Jesus Christ where He taught to love everyone in the closest circle of human communication, should be considered within the category of equality.

It should be understood that the establishment of equality criteria is as an extremely difficult thing now as it was then. These criteria are obviously different for each person, as it objectively can be argued that people have love for themselves of different level. Some people treat themselves more leniently than the "neighbours", while others, on the contrary, are committed to addressing much more serious and difficult tasks than they would put before others, and hold themselves accountable in a much more severe manner than other people. Such

criteria were primarily of moral and traditional nature in the times of Christ. From that time onwards, attempts have been made to institutionalise them in certain legal norms.

At present, in addition to the general equal rights benchmark existing in national constitutions, international treaties and domestic laws, measures have also been taken to implement this principle in a more specific way. In particular, in countries with the civil law tradition specific statutory and regulatory legislation is adopted to regulate certain aspects of the equality of rights principle (on the grounds of sex or religious or political beliefs, etc.). The provisions of procedural law are to the large extent dedicated to this. In the common law countries courts decide primarily on this issue, establishing effective precedents that may remain mere precedents, or may later be enshrined in legislation.

And yet, even if clear criteria are lacking to define both the concept of equality of rights and ways by which it is primarily related to the rules and traditions of a particular state or a social unit subject to the application of such rules, discrimination cannot nonetheless exist if there are no precise restrictions, that is, situations where certain persons at law have a legally justified advantage (privilege) compared to other persons. Criteria for such a prohibition are no easier to establish than the criteria for determining equality, however, humanity has identified in the process of its evolution certain social relations contrary to the concept of "equality" and indicative of discrimination. They are not exhaustive, and each society may establish its own additional criteria, due to its specific development in its territory and under special circumstances, or reject or amend the existing criteria, but the vast majority emphasize that the following restrictions should nevertheless exist.

The **prohibition of direct and indirect discrimination** has a rule that it should be **clearly and unambiguously** set out by the law. And this means that different methods of interpreting this norm should have the same results. Furthermore, such a prohibition should be compatible with **mechanisms established by legal acts that prevent discriminatory situations.** Their development is the primary objective of state and other public bodies. They should base the development of such

mechanisms on the knowledge related to the history of their own and other countries and on the practices and knowledge of relevant international organisations, non-governmental organisations and civil society activists engaged in non-discrimination.

The Constitution of Ukraine also contains the basis for the relevant mechanisms of preventing discrimination. Part 2 of Article 24 prescribes that there must be no privileges or restrictions on the grounds of race, the colour of skin, political, religious or other beliefs, ethnic and social origin, property status, place of residence, language or other. The development of these basic principles requires, first of all, active legislative work of the parliament and their implementation by public authorities.

In particular, **non-discrimination on the basis of status** is among the important criteria that should be taken into consideration in developing anti-discrimination laws. This means that regardless of the status of a person, different people should have equal opportunities under the same circumstances and no privileges should be permitted. Privileges might be in place only when circumstances under which people live are changing and not the status of them. The so-called "positive discrimination" is sometimes permitted when a person who has performed a particular socially important function or a work receives a certain amount of additional benefits as redress to him or her compared to people not involved in such activities. In the vast majority of cases, such redress relates to veterans of military service or police officers who have completed particularly complex missions, etc.

Territory is the next criterion. Territorial discrimination is not permitted too, as such state of affairs is an echo of colonialism, characterized by human exploitation on a territorial basis, because the colonizing states exploited the colonized territories in terms of both material and human resources. In its turn, this created an imbalance between the statuses of people in colonising states and colonies (to the disadvantage of the latter). Wars waged by colonies for their independence were a frequent consequence of such a state of affairs.

Religion is another ground. Discrimination on the grounds of religion belongs also to the situations under which equal rights of persons at

law are violated. It is not permitted for states to restrict religions as such. Exclusive state powers to impose restrictions in the sphere of religion should be applied only when life and health of its citizens are threatened. Otherwise, the inner world of each individual is his or her private affair and the state must provide full freedom in this respect.

The same goes for **political beliefs**. Only such political ideology can be prohibited that threatens the life and health of people. **Gender** and **age** criteria are no less important as sexism and ageism are at present extremely important indicators of equality which go contrary to the traditions of certain societies bringing sometimes about significant clashes. The grounds of **ethnic origin**, **language** and **property status** are important too. In fact, these grounds as well as those mentioned before, are artificial criteria dividing people who ought to and have to be regarded as having equal rights, therefore as the same as others who are entitled to have the same opportunities under the same circumstances.

2. Equality before the law

Is the content of the legal act compatible with the principle of equality of everyone before the law?

Doesn't the legal act provide for the instances of different treatment of situations that may be comparable (similar)?

Doesn't the legal act provide for the instances of the same treatment of different situations?

Doesn't the legal act provide for the existence of categories of people having special legal privileges?

Doesn't the legal act provide for the existence of certain individuals having special legal privileges?

If the legal act envisages privileges, are they well-grounded?

If the legal act envisages privileges, are they compliant with the legitimate purpose of their introduction?

If the legal act envisages privileges, are they compliant with the principle of proportionality?

Are benefits introduced by the legal act legitimate?

If the legal act envisages certain benefits, don't they excessively violate the principle of equality?

Commentary

Equality of persons at law before the law differs clearly from the previous principle of equality of rights because in the previous case equality concerned primarily the relations of individuals with each other, and here the relationship of an individual with socially established rules or standards are primarily considered, and such relationships should be the same for all individuals. Since old times there have been disputes as to whether laws are to be regarded as rules or standards.

In particular, the understanding of law as a rule of conduct, established by someone else, is inherent in the philosophy of Herbert Hart and his followers and is now called "positivism". Under this philosophy, the state, embodying social will, receives full power over its members, and therefore can and must regulate in as much detail as possible the conduct of individuals.

It is done by issuing written laws and regulatory acts and by entering into force, as a part of domestic law, of provisions of international treaties signed and ratified by a relevant state. Such a situation is comprehensible as it may seem, however, a number of challenges are inherent in it. The key challenge is the meaning of the "rule" word. It means a sequence of actions imposed by someone that a person of law must take under certain circumstances. The main problem with this concept, which casts a shadow on the effectiveness of the positivist theory, is that rules regulate processes and not results.

That is why many examples exist when a clearly followed procedure for certain actions under the law brings a result that is beyond the law. Under another approach, understanding of laws as standards has the opposite result. Standards do not necessarily regulate the processes of certain actions. Standardization is based on the concept of result,

therefore, the result itself should be a measure of whether certain conduct of an individual complies or fails to comply with the law.

However, from the perspective of the rule of law, the principle of equality before the law should harmoniously cover both processes and results. At the same time, if a conflict arises between them, precedence should be given to the latter. However, such precedence should not be a rule in itself, and, consequently, a disregard of a process should be an exception and be only well-grounded by specific circumstances of a certain situation. And the disregard of results in favour of processes is never acceptable.

The substance of the principle of equality before the law can be also revealed through the number of its components. The most important aspect that should be taken into account is **the absence of instances, clearly provided for in the legal act, of unequal treatment of situations that may be similar, and, vice versa, of equal treatment of situations that may not be similar**.

A breach of balance between persons at law is the main indicator of such situations. This is reminiscent of a real-life situation where an individual has received some benefits without queueing while other individuals were queuing, or vice versa when an individual who has been queuing has not received a certain benefit, while other individuals that have been queuing with him or her received such benefits. Such a situation results in an imbalance between the positions of privileged and non-privileged individuals, and it is the lack of this imbalance that the principle of equality before the law points at. At the same time, it is perfectly clear that in these cases compliance with the procedure (reflected by the fact of the need to stand in line) is required and not merely obtaining a legitimate result (lack of privileges, receiving the same benefit that others have received). At the same time, the very fact of the presence of this queue in some cases can be ignored, because if all those who queued and those who did not, receive the appropriate benefit and the moment (time) of its receipt is not relevant for their satisfaction with receiving this benefit, the factor related to process may not be so decisive.

The other cluster of criteria is closely related to the notion of privileges. In particular, a legal act **should not envisage that categories of people exist with special legal privileges**. This means that no legislative decision should provide that some groups of people may obtain more benefits and privileges than the other under the same circumstances. The mere fact that the law contains such mechanisms is a violation of the principle of equality before the law and as such, it casts doubt on compliance with the principle of the rule of law per se. In the same manner, it relates to **privileges established for individuals** and not for the groups only.

Privileges are being however established, and there are instances when their establishment does not result in the violation of the principle of equality before the law. It can happen when such privileges are **legally and objectively justified**.

Such privileges may be of two forms: advance and redress. In both cases, the establishment of privileges is necessary to balance the status of individuals who perform extremely important social functions and spend therefore more of their personal resources than other members of society. In order to restore the balance related to the status of such persons, society may grant by law appropriate privileges either in advance or after the individual or a group of individuals would have performed their functions which are exclusive and socially beneficial.

However, here it should be very carefully clarified whether the **purpose of the establishment of such privileges was legitimate** and not only to what extent they were legally and objectively justified. All justifications for the relevant privileges should be based on the fact that there have been and still are objective reasons for the existence of a relevant benefit, and not only on the mere fact that legislation provides for such an order. Besides this aspect, such an important indicator as the **proportionality of the established privileges** should be added as each exceptional human activity has its limits, which must correspond to the limit of (primarily financial) capacities of the state or a territorial community.

If disproportionately large privileges are established, it will result in destroying the balance between members of society and will make such privileges an end in itself of the relevant activity for which they are established. Often it leads to worsening of the relevant quality. At the same time, disproportionately small privileges minimise the very fact of their existence and establishment, as they fail to be a proper incentive for quality performance of important functions. Other aspects intrinsically stem from the ones mentioned above.

The effect of the Law of Ukraine "On ensuring equal rights and opportunities for women and men" can be a relevant example of how such approaches are applied. This Law has been well-founded and legitimate, as its purpose was to ensure parity between women and men in all spheres of social activities. However, the chosen legal mechanisms of its implementation do not provide effective and proportionate regulation of real social relations, distorting thereby the perception and effect of the entire Law.

3. Non-discrimination and its main requirements

Doesn't the legal act include provisions that are direct discrimination?

Doesn't the legal act include provisions that are an indirect discrimination?

Does the legal act include provisions where grounds for possible discrimination are listed?

Does the legal act include provisions that establish conditions for positive discrimination?

If the legal act puts an individual in an unequal situation compared to others, is such a situation justified by a legitimate purpose?

If the legal act puts an individual in an unequal situation compared to others, is such a situation proportional?

Does the legal act provide for effective means of protection from discriminatory use of legal norms?

Commentary

Discrimination is in itself an incarnation of the destroyed balance between legal statuses of different persons under equal circumstances. The main purpose of the consolidation of the rule of law principle is to provide for the balance between the legal statuses of individuals in a state and in the relations between the state and individuals.

No absolute parity may exist in such relations as the society has empowered the state with the performance of important functions, which in part may require that human freedom be restricted, however, the principle of the rule of law establishes red lines which public authorities may not cross in performing their functions.

As it has been repeatedly stated in previous sections, the problem is that, as circumstances change, it is very difficult to clearly define such red lines, because what was impossible to imagine 20–25 years ago is now perfectly acceptable (for example, the now widespread concept of entrepreneurial activity, which underpins the economy of the entire developed world, was criminalized in Soviet times under the notion of "profiteering" which incurred real punishments for people). Measures encouraged now in many countries to increase tax revenues, combat unemployment, and many other positive changes were condemned and prohibited during the Soviet era. Individuals willing to engage in entrepreneurship were discriminated against by establishing the direct prohibition of such activity and sanctions if such prohibition was violated. However, discrimination should not be seen as an absolute evil. It is, without doubt, an absolute evil when a person or a group of persons discriminated against do not have access to certain benefits, accessible by other individuals under the same conditions, but only when the access of others to such benefits is objectively and not only legally reasoned.

There are instances when discrimination is applied with positive purposes to give vulnerable groups an opportunity to restore balance with others (less vulnerable) categories in terms of their legal status. Under such circumstances, legislative provisions should take into consideration that the main purpose of their introduction should be maintaining

the balance of legal statuses of different categories and not only that they should be legitimate. Before passing such laws the Parliament should review in a systematic manner the state of affairs, taking into consideration the regulatory impact of a possible decision on the domestic legal system as a whole and not only in a specific case. To ensure this, laws should include the following aspects.

First, legal acts should not include provisions that are **direct discrimination**. It is especially important for the Constitution, which provisions in no way may result in situations of direct discrimination of any specific individual or a group of individuals on any ground (language, ethnic, political, sex, religious grounds, etc.). Such provisions must not also appear in laws adopted on the basis of constitutional provisions. Moreover, if an international treaty including provisions with indications of direct discrimination is signed or ratified, this should be also pointed out either when the document is prepared for signing or when it is ratified.

It is equally important that laws do not include provisions of **indirect discrimination**. Indirect discrimination is a notion that is more complex than a direct one, as it is, as a rule, formulated in such a manner that it is difficult to identify the fact of discrimination. Another difficulty is that there are cases when indirect discrimination may be included in relevant provisions involuntarily or unintentionally. In such cases, it can be especially insidious.

Lists of criteria or **indicators of possible discrimination** facilitate the identification of direct and indirect discrimination. Such indicators should be clearly listed in the legal act and they can serve as a benchmark for those who would further apply them. The establishment of such indicators will assist bodies that apply the law to better understand what is considered in a certain society direct or indirect discrimination to accelerate the process of application of law and make it less time-consuming. At the same time, it should be understood that the process of establishing such indicators cannot be stable, because, as it was more than once discussed in previous sections, circumstances may evolve over time, but laws should provide, despite any changes, a clear list of indicators of possible discrimination. Therefore, bodies that

apply law should very carefully review provisions of the law, compare them with the changed circumstances, pay attention to all the changes that occurred under new circumstances and adjust the legislative provisions accordingly.

While assessing provisions of law it is also worth taking into consideration whether the legal act contains provisions with **positive discrimination**. The positive discrimination has already been discussed in previous chapters. In particular, it takes place when certain categories benefit from the excessive losses they have already suffered for the benefit of society or when society seeks to help its members, who are unfortunately inherently placed in unequal conditions.

In addition, attention should be paid to the cases when a legal act puts a person in an unequal position in relation to others and it should be assessed whether such a provision is **legitimate** (provided by legislative acts) and **proportionate** (fully reflecting the provision of such amount of additional benefits compared to other persons, which is neither more nor less than what is required to restore the destroyed balance).

And the last but not less important aspect of this principle is that legal acts should ensure **effective remedies against the discriminatory application of legal norms**. Such remedies can be different: recourse to relevant competent officials of the executive of local self-government bodies, a judicial remedy, other legal mechanisms protecting individuals from the discriminatory application of legal norms.

4. Special cases of discrimination

Does the legal act include grounds for the need to apply positive discrimination?

Does positive discrimination prescribed by the legal act correspond to its legitimate purpose?

Are there provisions in the legal act that clearly identify specific individuals or groups that are subject to positive discrimination?

Does the legal act prescribe time periods for possible discrimination?

Does the legal act provide that positive discrimination be abolished when the purpose of it is attained?

Does positive discrimination prescribed by the legal act correspond to the principle of proportionality?

Does positive discrimination provided by the legal act overcome structural inequality?

Does positive discrimination provided by the legal act overcome material inequality?

Does positive discrimination provided by the legal act overcome the inequality of opportunities?

Commentary

As it was more than once said earlier in the previous sections, there are cases when discrimination by law is acceptable within the principle of the rule of law. At the same time, it should be remembered that the main reference point for such cases should be that they are exclusive and non-systemic in nature. Discrimination is possible primarily as redress to certain members of society who have done something extremely important to society, something that other members would not be capable of and from which they and other members of society have benefited greatly.

At the same time, the efficiency of such actions done by members of society or of such a group of individuals should be extremely high, primarily because the society itself has a duty to determine how much resources (human, material, etc.) it is eager to spend to ensure such benefits and privileges. At the same time, the following circumstances should be taken into consideration when certain legislative norms are provided with indications of discrimination.

In particular, any such legal act should be **well-grounded in terms of the need for discrimination**. Any derogation from the well-established rules should be clearly explained and grounded. First of all, this concerns those of them that would get the discriminatory status. A

legal act should demonstrate in what manner such provisions can restore the balance between the rights of all individuals concerned, including those who have also suffered certain losses but have not received the benefits that others have received.

It should be mentioned that, in addition to the need to justify discrimination, the discrimination that already exists and is prescribed by such a provision, should pursue a **legitimate goal**. This means that each aspect provided for by a discriminatory provision should be based on the provisions of another higher-level legal act, which, in turn, pursues the goal of introducing exactly such a norm. In this case, the justification for such a provision should be included in the legal act of the higher level, which establishes such a goal.

The next criterion related to this principle is that the legal act should include a provision (provisions) identifying **specific individuals or a group of individuals in respect of whom positive discrimination is applied**. This requirement is a continuation of the requirement, more than once mentioned above, that legal acts be clearly worded and the reasons for and consequences of the introduction of discriminatory norms be definitely explained in an understandable manner. Among the reasons for such an explanation is the requirement to indicate individuals or groups that would benefit from such discrimination. Similarly, it is recommended in such cases that the discriminated groups or individuals be identified too. It is one of the requirements that concern legal certainty and would help persons at law to clearly know and understand the consequences of their actions.

Of no less importance is that legal acts that include discriminatory provisions **should provide for their cancellation if the goals pursued by such acts are attained**. Abolition of a discriminatory norm is an obligatory condition for all such norms, whether it be positive discrimination or discrimination as such, as any discrimination in any form is provisional and is introduced deliberately for a certain time period to attain the legitimate goal set by the legislation. When such a goal is attained, there would be no need for such a norm and therefore it should be cancelled.

Similar to the previous section, here it is also about the principle of the **proportionality** of discrimination. Even if it is introduced by a certain legal act, its scope and effect should be proportional to the instance that requires redress, which such discrimination is intended to balance. Its scope can be neither more nor less than what is needed for the necessary balance to be introduced.

Within the definition of the proportionality of discrimination it is worth mentioning some essential elements of discrimination, in particular, that **positive discrimination should eliminate structural and material inequalities, as well as the inequality of opportunities.** These three aspects are related to the essence of the notion of discrimination. As already mentioned above, when discriminatory provisions are set out, the process should be governed by their provisional nature underpinned by the attainment of necessary objectives, in particular, those that were mentioned above and are related to eliminating structural inequalities.

No individual should feel that he or she is structurally different from any other individual. It should be added here that no individual, regardless of his or her property status, should experience infringements or any other discriminatory manifestations indicating that his or her legal status is not recognized by other individuals or that they neglect it. At the same time, all this should be perceived through the understanding of equality of citizens, especially in terms of the equality of opportunities under the same external and internal circumstances. Therefore, discriminatory legislative norms should be designed so that they should not establish unequal opportunities, but on the contrary, their introduction should correct the situation, result in balanced relations between individuals and provide them with equal opportunities under the same circumstances.

5. Positive discrimination

Does the legal act include provisions that objectively justify the cases of discrimination?

If the legal act includes discriminatory provisions concerning military personnel, to what extent is it well-grounded and justified?

If the legal act includes discriminatory provisions concerning people who suffered from natural and other disasters, to what extent is it well-grounded and justified?

If the legal act includes discriminatory provisions concerning people with disabilities, to what extent is it well-grounded and justified?

If the legal act includes discriminatory provisions concerning school and university students, to what extent is it well-grounded and justified?

If the legal act includes discriminatory provisions concerning pensioners, to what extent is it well-grounded and justified?

If the legal act includes provisions establishing discrimination on the grounds of religion, to what extent are they well-grounded and justified?

If the legal act includes provisions establishing discrimination on the grounds of education, to what extent are they well-grounded and justified?

If the legal act includes provisions establishing discrimination on the grounds of territory, to what extent are they well-grounded and justified?

If the legal act includes provisions establishing discrimination on the grounds of language, to what extent are they well-grounded and justified?

If the legal act includes provisions establishing discrimination on the grounds of politics, to what extent are they well-grounded and justified?

Commentary

Positive discrimination is one of those its types that should not at first glance cause any concern as "positive" is perceived as "good". Although being positive, such type of discrimination does not, however, cease to

be discrimination with all advantages and deficiencies inherent in it. This being said, such its type has more advantages than deficiencies.

In particular, positive discrimination is introduced when different groups receive in advance some benefits as redress for their future actions for the benefit of society or receive such benefits ex post facto as a reward for particularly useful past actions for the benefit of society.

The main purpose of such positive discrimination is to establish a balance between the legal status of individuals that would become subjects of such discrimination (discriminated individuals) and individuals that would not be affected by it. However, this type of discrimination is criticised as in most cases it seeks to establish a balance based on statistical equality and often does not take other factors into account.

Ordinary people also often criticise positive discrimination as they often cannot understand why certain groups receive additional benefits. In such cases it is about the lack of knowledge of those who criticise such situations about their real situation and the real situation of those who become subject to positive discriminations (that is, with the status of those discriminated). Or in such cases, it is about deficient mechanisms of introducing relevant privileges which do not in fact bring about necessary results.

Positive discrimination is most often provided for by either legislative provisions or relevant local traditions historically rooted in a certain society. However, legal acts including provisions for positive discrimination are obligatorily required to be **well-grounded**. This requirement is correlated with the general requirement for discriminatory provisions: they should be to the fullest possible extent clarified and justified so that no issues are raised by those who doubt the necessity of the introduction of such provisions. In particular, whenever discriminatory provisions are introduced (even if it about positive discrimination), there should be grounds to base such a decision on, and ideally, the effect of the introduction of such a provision should also be assessed.

In addition to being justified, positive discrimination should meet other important criteria, one of which (and perhaps the most important one)

is related to the objects of discrimination (the person being discriminated). Thus, **positive discrimination of military personnel** is introduced as a tribute to their important role in protecting the territorial integrity and inviolability of the state.

Positive discrimination of military personnel has been known since ancient times. In most ancient and medieval states, the military had a privileged status. Often military service was virtually the only way to change one's social status. For example, in ancient India, servicemen were a separate caste with a status lower than the caste of Brahmin priests only but higher than all others. Different countries still preserve privileges for military personnel due to the difficulty of their service. Such positive discrimination is in general positively perceived by people, as members of this group are often present in many families, so people are well aware of the nature of military service and adequately assess the need for such positive discrimination.

The perception of other categories of subjects of positive discrimination (categories of persons positively discriminated) is rather different. In particular, positive discrimination of **victims of natural and other disasters** is not based on the criteria of their social usefulness. Contrary to that, it is social compassion towards people temporarily trapped in discriminatory circumstances and often against their will. On the one hand, society has no obligation to provide such support, and there are states where it is entrusted to insurance companies (if an insurance policy is in place). However, most societies entrust the state with sharing and coordinating such support, therefore positive discrimination of such people is, as a rule, provided by the domestic legislation. At the same time, societies do not always agree with such provisions.

In addition to the category mentioned above, **people with disabilities, school and university students and pensioners** are included to specific groups subject to positive discrimination. These three categories are unified as they all are subject to positive discrimination because society reacts to their limited capacity to implement their opportunities compared to other individuals. In particular, school and university students often lack the knowledge and experience necessary to make

well-grounded and well-balanced decisions and so there is a number of aspects of their lives where they are positively discriminated by society. People with disabilities and pensioners often cannot, in the same manner, realise their opportunities, however, due to other reasons and primarily due to their health status, age and other limitations. Other people also often perceive rather ambiguously the positive discrimination of such individuals. In particular, such type of positive discrimination is far from universally accepted. There are countries where pensions and benefits to the school and university students and people with disabilities are not being paid and such obligations are transferred to those persons themselves, their relatives, charity and religious organisations. Positive discrimination may also concern **religions**.

It is mainly related to the traditions of the relevant states and may provide for privileges to a certain religious group compared to others. Such cases are far from being isolated in the world. However, the principle of the rule of law prescribes that, in this case, followers of other religions should have the right to freely practice their religions and obtain state protection from wrongful infringements.

Similar to positive discrimination on the grounds of religion, such discrimination may be established on the grounds of **education**, when, for example, there is a requirement to have a certain education to be able to perform certain jobs. However, this is objectively explained by the fact that a person without such education will simply not be able to perform a certain job and will be incompetent, so that the establishment of this type of positive discrimination seems to be justified.

At the same time, the establishment of positive discrimination on the **territorial, linguistic or political grounds** should be done very carefully, as these are the areas where it is very difficult to adequately assess the level of positive discrimination needed at a given time, as it depends on very many conflicting factors.

PROPORTIONALITY

The principle of proportionality is a determinant element in the system of the components of the rule of law, although the *Rule of Law Checklist* of the Venice Commission does not include it among such elements. It is aimed primarily at establishing a reasonable balance between the instances of human rights restriction necessary in a democratic society and the legitimate goal of such restriction. ECtHR case-law calls it a "proportionality test". Although the scope of application of this principle has been significantly widened in the process of its long-time evolution, the need to strike a balance between private and public interests remains determinant even now. This principle is important to ensure that an individual understands under what procedure and in which cases restrictions on human rights may be imposed and which public authorities may impose them. It means that public authorities are not permitted to act at their own discretion when the implementation of human rights is at stake, but are permitted to act only within the limits and procedures established by the Constitution and the laws.

Furthermore, this principle regulates the proportion between the aim pursued and the means and methods to attain it. This principle is underpinned by the idea that the general interest by which the state is governed cannot repress the freedom of an individual. No temptation to restrict the actions of an individual or, moreover, undermine totally his or her freedom with reference to the need to combat economic crises or other social threats can be justified in a democratic state governed by the rule of law.

It is exactly there that the idea of fairness – a basic value underpinning law – is implemented.

As national constitutions and international legal instruments formulate reasons for restricting human rights and freedoms in rather general terms and by the so-called "value concepts", the judiciary still plays the determinant role in the interpretation and clarification of the principle of proportionality in specific legal situations. International courts and, in particular, the ECtHR and national, primarily, constitutional courts have established, in the process of their long-term practice, a number of requirements stemming from the principle of proportionality which can be summarised as follows:

- any restrictions on fundamental rights and freedoms may be imposed only by laws, pursuant to goals established by the Constitution (or international legal instruments) and only within limits necessary for the normal functioning of a democratic society;
- such limitations may be imposed only whenever less intrusive measures (ways and methods) to prevent violation of rights and freedoms of other individuals and protect public interests are absent;
- measures restricting rights and freedoms should not have excessive consequences and must be severely conditioned by the goal that is pursued.

Foreign jurisprudence and, in particular, the ECtHR case-law have also established, in value-based categories, certain criteria related to public interests (although not defined in absolute terms) that are of significant importance for the application of the proportionality principle, for example, "necessity in a democratic society"; "pressing social need"; "legitimate aim pursued", striking a fair balance between "general" and "individual" interests, etc. The case-law of the Court in Strasbourg has a significant impact on the domestic, and, in particular, Ukrainian judicial practice.

The proportionality principle continues to perform its main function as an instrument for ensuring a fair balance between the requirements of public interest and the need to guarantee the fundamental rights of individuals. However, throughout the process of its development, it has significantly increased its scope.

In addition to being applicable to defining limits for possible restrictions of human rights and freedoms by the bodies that apply law, it

- covers all spheres and types of public actions, including legislation;
- covers relationships within both public and private law.

This means that the principle of proportionality extends its effect to almost all legal issues: regulation of powers of different state authorities and local self-government and their balancing, prevention of abuse of discretionary powers, the establishment of the margin of appreciation in deciding on the interaction between constitutional rights and freedoms, proportionality between sanctions and committed crimes, between work and remuneration, rights and obligations of creditors and debtors, the balance between rights of parties to trial, etc.

1. Main proportionality requirements and their legislative regulation

In what manner is the proportionality principle regulated by laws?

In what manner are the different elements of the proportionality principle regulated by laws?

Does the legislative regulation provide for a sufficiently comprehensive reflection of the principle of proportionality?

Are the conditions of a balance between private and public interests defined in a sufficient manner?

Are this principle and its elements primarily reflected in laws or in regulatory acts?

Are there any discrepancies between the regulation of this principle and its elements in different legal acts?

Are there any gaps in the regulation of certain elements of the proportionality principle? Isn't such regulation lacking altogether?

Is the aim, in pursuance of which rights are limited, legitimate and substantial?

Are the means to attain such an aim well-grounded?

Is the restriction of individual rights to pursue such an aim of a minimal nature indeed?

Is the restriction of individual rights to pursue such an aim proportional indeed?

Is the legal act compatible with the practice of the Constitutional Court of Ukraine in applying the proportionality principle?

Is the legal act compatible with the practice of the Supreme Court of Ukraine in applying the proportionality principle?

Is the legal act compatible with the practice of the European Court of Human Rights in applying the proportionality principle?

Commentary

The principle of proportionality as an element of the system of components of the rule of law has been developed in the case-law of primarily the German courts, which formulated it. In due time it was accepted, developed and updated by the courts of the UK, the United States, Canada, Israel and other countries, as well as such supra-national courts as the European Court of Human Rights and the Court of Justice of the European Union.

Nowadays proportionality ceased to be exclusively a judicial instrument for courts to establish whether acts of law correspond to the requirements of the rule of law. Proportionality, or the "proportionality test" as it sometimes is called, eventually becomes a basic element of all acts that establish and apply the law, and in the first instance of those of them dealing with restrictions of human rights.

The essential foundation of the principle of proportionality is that it recognizes that the vast majority of human rights and interests are not either absolute or such that prevail in advance over the rights and interests of others, or the interests of the state and society. Each specific situation where there are overlapping or conflicting private rights, or private and public rights and interests, requires striking a fair balance between them. The very fact of striking such a balance should be the key to stable, predictable development of social relations and prevent

crises in public and private spheres of life. It is possible to find and attain such a balance by applying a set of interrelated requirements and methods; some of the issues pertaining to them will also be discussed in the following sections.

This section deals with the main proportionality requirements and the status of their legislative regulation. It should be mentioned here that the requirements of the principle of proportionality can be standardized, in a more or less detailed form, in legal acts governing relations in all areas of law and interdisciplinary areas without exception. It applies first and foremost to constitutional law. They are also standardised and applied in criminal, civil and labour law and in other spheres of law.

The following requirements should be mentioned among the main ones: the existence of legitimate and substantial aim, in pursuance of which human rights are being restricted; substantiation and justification of the means to attain such aim; the proportionality of the restriction of human rights, etc.

In particular, part 2 of Article 64 of the Constitution of Ukraine includes the provision prescribing that "under conditions of martial law or a state of emergency, specific restrictions on rights and freedoms may be established with the indication of the period of effectiveness of these restrictions. The rights and freedoms envisaged in Articles 24, 25, 2 7, 28, 29, 40, 47, 51, 52, 55, 56, 57, 58, 59, 60, 61, 62 and 63 of this Constitution shall not be restricted."

This provision determines that human rights are restricted exclusively in the event of martial law and a state of emergency and the duration of such restrictions should be mandatorily indicated. It also outlines the range of human rights that are not subject to restriction. It determines only the legitimacy of a possible restriction of human rights; while the purpose of such a restriction is presumed, the restrictive means, the justification of the chosen means and the proportionality of the restriction should be detailed by other legal acts or decisions on how to apply legal norms.

Another example of the constitutional embodiment of the principle of proportionality is Article 39 of the Constitution of Ukraine, which

says: "Citizens have the right to assemble peacefully without arms and to hold meetings, rallies, processions and demonstrations, upon notifying in advance the bodies of executive power or bodies of local self-government. Restrictions on the exercise of this right may be established by a court in accordance with the law and only in the interests of national security and public order, with the purpose of preventing disturbances or crimes, protecting public health, or protecting the rights and freedoms of other persons."

In this case, constitution-makers exhaustively determined by legal means the legitimate and substantive aim of restricting the right of people for peaceful assemblies and demonstrations. It remains the prerogative of the law and courts to decide on the procedure for the imposition of a restriction, on whether the means of attaining the goal pursued are well-grounded and justified, and on the proportionality of the restriction of human rights.

The above-mentioned examples relating to the regulation of requirements pertaining to the proportionality principle in the Constitution are not exhaustive. As it was already discussed, they may be identified in various branches of law. First of all, this applies to the rules that establish liability for the commission of offence or infliction of damage, where the proportionality between the severity of the consequences of the offence and the sanction, between the damage inflicted and redress, etc., is clearly manifested. Accordingly, the level of detail and regulation of the requirements pertaining to the proportionality principle will directly determine the effectiveness of its implementation in specific legal relations and its wide use in the application of law.

2. The requirements of appropriateness

Is there a discrepancy between the principle of proportionality and the aim pursued by lawmakers?

Is there a discrepancy between the aim pursued by lawmakers and the means of its attainment?

Are the means to attain such an aim established by lawmakers appropriate, in view of the legal certainty requirements?

Are the means to attain such an aim established by lawmakers appropriate from the perspective of the legal support for their implementation?

Are the means to attain such an aim established by lawmakers appropriate from the point of view of material resources available for executors?

Isn't the aim pursued by lawmakers distorted by the means of attaining it (as a general rule, the end should not justify the means)?

If lawmakers did not provide guidance as to the means of achieving the aim, are there established limits of discretion?

Is the restriction imposed on individual rights excessive?

Isn't the damage inflicted to a person excessive compared to the achievement of a public aim?

Are there any other, less intrusive means of restricting rights?

Commentary

This section is dedicated to the appropriateness, a requirement belonging to the proportionality principle, that is actualized mostly when laws are applied. In exercising their powers, public authorities face numerous situations when they have to make decisions that may restrict individual rights. Examples of this are the following: allocation of land for construction, possibly affecting the rights of other residents in terms of environmental safety; use of public infrastructure; buyout of private property to meet public needs, when it comes to providing fair compensation, etc.

In these and similar cases, the proportionality principle should be applied to strike a fair balance between public and private interests. Such balance can be struck in different ways, in these examples mostly by a redress (compensation). The means by which such an effect would be achieved should be tested, in particular, for appropriateness. The appropriateness requirement is characterized by the aim that should

be attained by means that are focused on such attainment and by the relationship between the aim and the measure. First, the appropriateness of the aim pursued by possible restriction of rights should be tested for its legitimacy. If there is no such aim provided by law, then, respectively, it is inappropriate and there is no sense in reviewing the means of addressing the situation through the lens of the proportionality principle.

If such an aim is defined in the law, then the following step within this test will be to assess whether the aim and means of its attainment are compatible with the legal certainty principle. Accordingly, the appropriateness of the legal provision to be applied will depend on the clarity, preciseness and comprehensibility of the provision. Norms defined by law-makers should not be interpreted arbitrarily in expanded or narrowed ways by those whom they concern, and the whole process of their implementation should be clearly regulated in a manner consistent with the principle of legal certainty and without gaps or conflicts, otherwise, they may also be deemed inappropriate for the application of the principle of proportionality.

The reality of both the aim pursued and the means to attain it should be regarded as another component of appropriateness. Lawmakers should not set unattainable goals and impose obligations that cannot be fulfilled. This concerns primarily material resources available for the bodies that apply the law, their functional and institutional capacities. The goal itself must be attainable, and the practical impossibility of attaining it by means that are unthinkable to be implemented makes in the same fashion the application of the principle of proportionality inappropriate.

This requirement indicates the need to establish a clear and sufficient relation between the aim and the means of attaining it, which can also be assessed in terms of appropriateness. Such a connection is characterized by the fact that the chosen method should contribute to the attainment of the expected result and not exceed its limits. If means to attain the aim exceed its limits, such relation is broken, possibly

resulting in excessive restrictions on human rights, distortion of the purpose for the sake of which certain actions have been taken, etc.

These elements of appropriateness seen as one of the requirements of the proportionality principle are inherent in acts that both make and apply the law. When exercising legal regulation that provides for possible interference with or restriction of human rights, the lawmakers must also have a legitimate aim and formulate clear, precise and feasible means of attaining it, which do not make possible its distortion and excessive restriction of human rights.

3. The requirement of necessity

Doesn't the legal act narrow the content and scope of existing human rights?

Does the legal act establish instances when human rights are restricted?

If such instances of restriction of human rights are established, is this done by a law or by a regulatory act?

Is the aim of the restriction of human rights clearly defined in the legal act?

Are restrictions of human rights established by the legal act compatible with their aim?

Is a reasonable balance maintained between the restriction of human rights and its aim?

Is the approach of minimal human rights restriction applied? Aren't there any excessive restrictions imposed on human rightsthat may lead to its violation?

To what extent restrictions imposed on human rights are compatible with the Constitution and the laws of Ukraine?

Do restrictions imposed on human rights comply with the international and, in particular, European human rights standards?

Commentary

This section deals with issues that characterize the principle of proportionality through the requirement of necessity, which should be established after passing a conditional test for the appropriateness of the aim and means of restricting human rights. This requirement is underpinned by the need to search for the less intrusive method of such restriction.

When developing acts that make or apply the law, the content of which may restrict human rights, due attention should be given to the fact that weighing rights and interests, public or private, the selection of the least intrusive means of restrictions, etc., is not a mechanical or mathematical procedure. It should be taken into account that a human being is both the highest value and the bearer of needs and interests and not of rights only, that he or she also has inherent intentions and expectations, seeks stability and security, etc. Therefore, the principle of proportionality is closely related to the principle of reasonableness, which should be applied throughout, helping, by value judgments, to highlight the proper weight of the right, the real purpose of its restriction, the most favourable or least intrusive, in the view of a person, means of attaining it, fair compensation for the limited right, etc.

In view of the above, after the positive results are obtained of testing the means to attain the goal and compliance with the appropriateness criteria, it is natural to raise the issue of testing means of implementation of the proportionality principle for their necessity in the circumstances of a particular situation. According to the practice of application of legal norms, appropriate means of restricting human rights underpinned by a legitimate goal will in some cases be necessary, and in others, they will be excessive or insufficient.

For example, the national parliament decides to ban the use (exploitation) of wild animals in circuses or similar performances. It is obvious that the law-makers pursue an absolutely legitimate goal, aimed at preventing cruel treatment of animals or keeping them in inappropriate conditions, etc. At the same time, the owners of these animals have their interests, as they legitimately expected to use them and

gain profit from performances. In this case, the prohibition should be complemented by proportional, appropriate and necessary means to redress for the loss of property and should not undermine public confidence in authorities. One such option can be that the state buys out animals from their owners and transfer them to zoos or other places where appropriate conditions would be provided for them. Such a mechanism should be outlined in detail to provide an appropriate procedure for determining the costs, deadlines, responsible parties, communication means, appeal opportunities, etc. However, if, following such procedures, the buyout prices would appear disproportionately low compared to the owners' costs and lost profits, etc., and, in other words, unfair, such a measure would be considered insufficient and therefore cannot be regarded as necessary despite the legitimate aim and appropriate means to attain it.

Such state of affairs indicates that the requirement of necessity should be determined by a comprehensive analysis of a particular situation and of all the circumstances that characterize it, as absolutely identical situations are almost non-existent and each situation has its own characteristics and distinctive features. In addition, possible alternative means of attaining the aim and their deficiencies and advantages should be reviewed, respectively, to weight and select the means that would be most practical. This intellectual process of assessing the situation involves weighing various aspects of goals and means, actions and consequences, public and private interests, and the ultimate purpose of it is selecting a method that would minimally restrict human rights to attain a fair balance between public and private interests.

An example of necessary interference in human rights by public authorities is the introduction of an algorithm for the initial use of softer means of influence that do not envisage possible damage, such as warnings, with a gradual transition, if a legitimate aim is not attained, to more severe ones, such as legal prohibitions, imposing legal obligations, etc.

4. Prohibition of excessiveness

Are the instances of restriction of human rights and procedures for such restriction established by legal acts other than the Constitution and the laws of Ukraine, compatible with the Constitution and the laws of Ukraine?

Are the instances of restriction of human rights and procedures for such restriction established by legal acts compatible with the European Convention on Human Rights and other international human rights instruments?

Do such instances comply with the criteria of "necessity in a democratic society"?

To what extent is the proportion between the reason for the restriction of human rights and the means of its attainment balanced?

Do the instances of restriction of human rights comply with the "proportionality test" developed by the ECtHR case-law?

Doesn't the legal act prescribe restrictions of human rights that are so excessive that the mere essence of the law is diluted?

Doesn't the aim of restricting a human right result in fact in its minimisation?

Does the legal act correspond to the approach under which it is unacceptable that the law distorts the essence of human rights?

How many applications to courts are there which are related to excessive restriction of human rights established by a certain legal act?

Are the appeals or applications to the ECtHR, decisions of the Constitutional Court of Ukraine and the ECtHR on violations of the principle of proportionality in the cases regulated by the relevant legal act compliant with the Constitution?

Commentary

This section is dedicated to questions, answering which makes it possible to determine the state of compliance with yet another requirement of the principle of proportionality, that is, the prohibition of excessiveness. In practice, the means of restricting human rights to attain a legitimate aim may be appropriate, however, their excessive impact on rights may dilute their essence, violating thereby the principle of proportionality which is aimed at seeking a reasonable balance between public and private interests.

An example of such exaggerated or excessive impact can be situations when a law or a decision to apply law establishes such conditions for rallies and demonstrations that, when implemented, distort the essence of the right to demonstrate. This right is one of the fundamental human rights of the same weight as the *right to be heard*. It plays an important role in communication between individuals and authorities and in particular in crisis times when there is a need to raise awareness of problems that concern people and public authorities do not address them. The implementation of such right is related to possible adverse impact on the legal order and the rights of other individuals, that do not participate in the event but suffer from inconveniences due to the possibility of traffic disturbances, excessive noise, security threats, etc. To strike the balance between the rights of both, authorities should develop relevant acts of law and adopt decisions to apply them with regard to the rules for holding mass events. Such acts may, under the principle of proportionality, impose restrictions on the participants to events and additional responsibilities on their organizers, which should be closely related to the legitimate aim, for instance, timely notification of the event, route of people's movement, number of participants, etc. The authorities, on their part, take responsibility primarily for ensuring security for both participants to rallies and demonstrations and ordinary people. A reasonable balance of restrictive measures that are legal, appropriate and necessary in a specific situation, should ultimately result in the unrestricted implementation of the individual right to

rallies and demonstrations, on the one hand, and the rights of others to a safe public space, unhampered communications, etc., on the other.

However, in countries with weak democratic traditions, conditions for holding mass events, as a rule, amount to an authorisation regime. Authorisation procedures are complicated and depend on the discretion of officials, and the authorisation itself can include such conditions that absolutely dilute the right to demonstrations. For example, a condition may be imposed on an event aimed at drawing the government's attention to a certain problem that it be held outside the government quarter or outside the city at all. In such a case, the principle of proportionality is not ensured as restrictions imposed on the implementation of a right are excessive and dilute its mere essence. Although the formal right to a demonstration is allegedly ensured, the purpose of the action is however minimised and the actor whose attention should be drawn to the problem appears inaccessible. Such excessive restrictions may also include an obligation for organizers of actions to pay for the work of law enforcement agencies or utility companies or to compensate for losses from changes in traffic schedules, etc.

The legitimate aim per se may be excessive in such cases and not only means of attaining it. Regarding mass events, the Constitution of Ukraine made it possible for courts to restrict the right to assemblies, rallies and demonstrations in the interests of national security and public order, to prevent riots or crimes, to protect public health or to protect the rights and freedoms of other people. In practice, cases when courts have ruled to ban mass events, referring to assumptions that only a ban can avert mass riots, etc., have not been isolated. However, the courts then failed to provide any evidence suggesting that the threat of riots, crimes or other adverse consequences was actual and real and could not be prevented by law enforcement measures. In this case, the excessive goal (in the absence of a real threat to the rights of other individuals) becomes the ground for a measure to restrict a right (a ban) that lacks proportionality.

5. Prohibition of formalism

Are instances of human rights restrictions appropriate for each specific situation?

To what extent do they have regard to the factual circumstances of each situation?

Doesn't the law which provides for restriction of human rights, give rise to legal conflicts or gaps possibly resulting in an uncertainty of the application of its provisions?

Doesn't the legal act create a situation of ambiguous application of instances of restriction or their wide interpretation (open lists, use of "etc."), which may give rise to abuse of power by public authorities?

Doesn't the legal act create discretionary powers of officials?

Is the principle of proportionality compatible with the principle of legal certainty?

Are the provisions of the law that establish instances of restrictions of human rights outlined in a comprehensible and unambiguous manner?

Is there a judicial practice of applying the provisions of the legal act that impose restrictions of human rights?

Is it compatible with the ECtHR case-law and the case-law of other international courts (bodies) on the application of the proportionality principle?

How often do domestic courts apply the principle of proportionality?

Commentary

This section is dedicated to questions, answering which makes it possible to determine the state of compliance with yet another requirement of the principle of proportionality, that is, the prohibition of formalism. The issues of whether applying the proportionality principle is relevant in a particular situation and of the selection of certain methods of its

implementation are closely related to the unacceptability of a formal attitude to human rights.

It primarily concerns the need to compare rights a priori considered to be the same for all in specific situations, when, due to various factors and circumstances, some of them may take precedence over others. For example, an individual right to health will take precedence in certain situations over another person's right to engage in entrepreneurial activity.

Similarly, rights and interests should also be compared in the vertical dimension of the interaction of individuals with society and the state. The modern law of democratic countries does not recognise that public interests have pre-established precedence over private ones. Nowadays an individual is not seen as a cog of a state mechanism. However, he or she is not isolated from both society and the state. An individual and the state are interrelated as they have mutual rights (and the state has powers) and exist interdependently. Everyday human life, the implementation of rights and meeting needs and interests occur not only in interaction with other people but also in interaction with public institutions designed to ensure and protect the rights and interests of individuals, society and the state as a whole. Accordingly, a human being cannot ignore the existence of particular public interest. As a result, there are instances when private rights may be restricted to protect public interests. The presence of such situations should be also identified by applying the comparative method and finding reasonable arguments in favour of the precedence of public interests over private ones or vice versa.

Furthermore, the ECtHR case-law has developed, in terms of the prohibition of formalism, the requirement, according to which it is not sufficient for the state to only refrain from excessive interference, but the state has an obligation to defend the individual autonomy of a person from the actions of the state itself.

The principle of proportionality envisages, in addition to the mentioned comparison, a number of other requirements, which, if satisfied, make it possible to argue that this principle is fully implemented. First and

foremost, as it was already mentioned, they relate to lawfulness (or the legitimacy of restricting rights), the presence of substantive aim of restriction, appropriate means of attaining it and the proportionality of damage inflicted by the restriction. Human rights cannot be restricted if such restriction is not established by the Constitution or laws. Moreover, the imposed restriction should be intended to attain a substantive aim. This means any restriction should have sufficient grounds, for example, social justice, significant public benefits or needs, the security of the society, etc. But no matter how significant the aim of human rights restrictions is, it in no way can be a justification for the chosen means of attaining such aim. A method of restriction should be appropriate and necessary for a particular situation. It should ensure that the aim is attained in the least intrusive for the rights of other individuals manner. To put it in another way, possible damage inflicted to human rights should be less than the benefit from such restriction.

Besides, if the regulation of the principle of proportionality does not rely on the relevant application and, in particular, judicial practice, it means that authorities took a formal approach to this principle. Furthermore, the case-law itself may manifest such a formal approach when the legal reasoning of a judgment, although having references to the proportionality principle and its requirements, does not however affect the content of the judgment. The mentioned is relevant also to the formal interpretation and application of the proportionality principle and its elements by courts which may manifestly contradict the existing practice of adjudicating similar cases by the European Court of Human Rights or other international courts.

PREVENTION OF THE ABUSE OF POWERS

Prevention of the abuse of powers, being the element of the rule of law, provides that powers are exercised in such a manner that would make it impossible to make unfair, ill-founded or despotic decisions. Limiting the discretionary powers of public authorities is the main method of preventing abuse of powers. Discretionary powers are the opportunity for public authorities and officials to make decisions by their own discretion within the limits of law and in compliance with the relevant requirements. They, as the element of the rule of law, require primarily that the actions of public authorities including the Parliament be subordinated to the consolidation and promotion of human rights and freedoms. They and their guarantees determine, in accordance with Article 3 of the Constitution of Ukraine, the essence and focus of what the state does. Inalienable and non-transferable human rights and freedoms discourage arbitrariness of not only executive authorities and the judiciary, but of the parliament also by determining its margin of appreciation in passing laws.

Fundamental rights and freedoms are determined in the Constitution in a rather general manner. The absolute majority of them needs to be detailed in the ordinary legislation otherwise relevant constitutional provisions may remain a declaration. Under the requirements of the rule of law, all rights should be established exclusively by the Constitution and laws and not by regulatory acts issued by executive bodies. This certainly does not deprive such bodies of certain discretionary powers when managerial decisions are made. However, even for such powers their limits and nature should be established by law.

Bodies of state power and bodies of local self-government and their officials are obliged to act, as it was already mentioned, only on the grounds and in the manner envisaged by the Constitution and the laws of Ukraine (Article 19 of the Constitution of Ukraine), that is, under the principle "everything not permitted is prohibited". References made by officials to the fact that the law does not provide for such prohibitions cannot be taken into account as they directly contradict the mentioned principle.

The need to prevent the abuse of powers (to limit discretionary powers) is related to all branches of government, however, it is of special importance for the executive. Wide discretionary powers of executive bodies and their officials often give rise to violations of citizen's rights and freedoms and provide grounds for corruption and other abuses. That is why it is no accident that the European Court of Human Rights and the constitutional courts of European countries pay significant attention to a clear definition of such powers and their restriction within severe boundaries of the law.

The limitation of discretionary powers means that no executive authority is permitted to determine by itself its own powers and, furthermore, establish such powers for the bodies subordinated to them and their officials.

Perhaps the most relevant issue in modern Ukrainian realities is the minimization of discretionary powers of officials in areas directly linked to the implementation of human and civil rights and freedoms (use of state and communal property, financial benefits and resources, taxation, supervision, etc.).

It is in these and similar spheres that, according to the practice, the most abuses are observed.

The limitation of discretionary powers is directly linked with such requirement of the rule of law in the system of executive bodies as the presence of thorough and effective procedures for the functioning of its bodies and officials and in particular, in their interaction with individuals. Unlike in many European countries, where there are special

codified acts that regulate such procedures in detail, in Ukraine these procedures remain almost the least regulated.

1. Constitutional guarantees limiting discretionary powers

Are there legal guarantees of limiting discretionary powers of public authorities?

How advanced are legal guarantees of limiting discretionary powers of public authorities included in the Constitution and laws?

How consistent is the judicial practice of applying such guarantees?

Should the Constitution and the laws provide for the limitation of discretionary powers of the judiciary?

Are there boundaries for such limitations?

Does the Constitution provide for legal guarantees of limiting discretionary powers of the Parliament?

Are there instances when the Parliament goes beyond the limits of its discretionary powers?

Are there sufficient guarantees limiting the discretionary powers of the President?

Are the discretionary powers of the President exercised in accordance with the Constitution and other components of the rule of law, in particular, with the consistent, equal and well-grounded application of the Constitution?

Does the Constitution provide for the guarantees limiting discretionary powers of the executive?

Are there sufficient guarantees limiting discretionary powers of the executive?

Are there instances when executive authorities go beyond the scope of their established discretionary powers?

Commentary

As it was already mentioned above, Article 19 of the Constitution establishes the principle of special permission under which bodies of state power and local self-government and their officials are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine. It means that the Constitution itself or the laws of Ukraine should delimit their margins of appreciation.

The norms of the Constitution do not include a direct indication that public authorities have an opportunity for multi-optional conduct in the exercise of their powers. At the same time, the implementation of some of them depends on the assessment of the relevant need to apply them. This means that the Constitution and the law allow executive and local self-government bodies and their authorities to choose at their own discretion a certain option of exercising such powers. Such powers are regarded as discretionary (powers of appreciation).

Powers of appreciation are necessary for a broad range of functions to be performed to implement public authority by considering all circumstances in the relevant decision-making. The Constitution and the laws cannot and should not exhaustively regulate all actions of public authorities, local self-government and their officials, therefore, where appropriate, such bodies are given an opportunity to choose discretionarily and under their own responsibility the best option of their conduct to attain the aims of legal regulation. However, competent authorities cannot exercise such actions in a free and arbitrary manner and without applying legal guarantees of exercising discretionary powers and the whole range of conditions and requirements to be complied with.

Therefore, the requirement to legally regulate implementation procedures and guarantees of discretionary powers reflects the requirements of the rule of law, that is, the principles of legality and prohibition of arbitrariness, which the exercise of discretionary powers should adhere to. The only question is whether relevant guarantees are sufficient and effective.

As to the highest state bodies, in particular, the Verkhovna Rada of Ukraine and the President of Ukraine, their discretionary, as well as any other powers are determined exclusively by the Constitution of Ukraine. An example of discretionary powers of the President is his or her right to sign a law within fifteen days and officially promulgate it, or return it to the Verkhovna Rada of Ukraine with substantiated and formulated proposals for repeat consideration under Article 94 of the Constitution of Ukraine. The application of a veto or a refusal to do so is the exclusive right of the President as the head of state. Another example is the President's power to declare a state of emergency in Ukraine or in some parts of it, as appropriate, under item 21 of part 1 of Article 106 of the Constitution of Ukraine. The same is true also for the Verkhovna Rada, whose powers prescribed by Article 85 of the Constitution are in part discretionary by their nature and may be used by it as it deems appropriate (for example, by adopting a decision to provide military aid to other states or to refrain from doing so).

The Constitution does not include direct requirements as to how discretionary powers should be exercised. At the same time, all general principles of the organization of power and the exercise of powers are important and they must be taken into account as general guarantees when discretionary powers are applied. In particular, one of such guarantees and principles is the principle under which a state's government is divided into legislative, executive and judicial branches and non-interference of certain bodies in the powers of others is provided, with relevant mechanisms of constitutional protection. For example, the right of the Verkhovna Rada of Ukraine to adopt laws on any important public issues can be exercised under Article 92 of the Constitution of Ukraine only if the powers of the President of Ukraine and other public authorities are not interfered with. If the Verkhovna Rada of Ukraine oversteps the scope of its powers, the issue should be decided by the Constitutional Court of Ukraine. Most specific requirements for the exercise of discretionary powers are determined by laws or the legal doctrine or the practice of law application, which will be discussed below.

2. Legislative mechanisms of limiting discretionary powers and preventing their abuse

Are there instances where public authorities exercise their discretionary powers and adopt decisions that are unreasonable or violate the freedom of individuals?

Does the law define the necessary scope of the Parliament's discretionary powers?

Is there a system providing for the absolute openness of parliamentary information?

Are there clear legislative limitations imposed on discretionary powers of executive bodies related to their administrative functions? Are they satisfactory?

Is there a system providing full transparency of information on the exercise of his or her powers by the President?

Is there a system providing full transparency of information on the exercise of powers by the Government?

Is there a system providing full transparency of information on the exercise of powers by the executive bodies?

Commentary

Executive authorities and their officials must inform the choice of conduct in making decisions within their competence by the constitutional principles taken in a certain correlation or subordination, and the principle of the rule of law among them, in particular, such its important components and requirements as the respect for human rights and freedoms, legality, non-discrimination and equality before the law, access to justice, legal certainty, the principle of separation of powers, reasonableness, proportionality, compliance with the norms of international law, etc. The mentioned makes it possible that the provisions of the Constitution exert an effective direct regulative impact on social interaction, as they have a direct effect. Non-application or violation

of such principles and requirements or ignoring them undermines the legal value of the Constitution, makes it fictitious, results in the distorted application of discretionary powers, damages the interests of individuals protected by law.

At the same time, constitutional regulation of discretionary powers belonging to public authorities and self-government and their officials should be supplemented and detailed by ordinary laws, as it was already mentioned. The national legal system should provide exhaustive and effective tools of legal protection from unlimited and arbitrary interference of authorities in human and citizen's rights or in the competence of other authorities, of their compliance with their powers and making impossible decisions that are unreasonable or violate individual freedom.

It is about regulating discretionary powers by public authorities themselves because, as it was already mentioned, the discretionary powers of the Parliament and President of Ukraine are regulated by the Constitution (an exception here is the regulation of discretionary powers of the Verkhovna Rada, which is done by the Law of Ukraine "On the Rules of Procedure of the Verkhovna Rada of Ukraine" and the laws establishing procedures for the exercise of their powers by members of the Parliament, its Committees and other bodies established by the Verkhovna Rada).

Laws should determine with sufficient comprehensiveness the scope of discretionary powers of executive bodies as any legal uncertainty can give rise to violations of the rule of law principle and individual rights and distort the essence of the law.

The current laws of Ukraine represent the level where conditions and guarantees for the exercise of discretionary powers, in particular by executive bodies, are determined in a detailed manner. However, even they do not exhaustively regulate the conditions, procedures and all possible guarantees of the exercise of discretion, leaving many significant and important issues to be clarified by the practice of law application and legal doctrine.

According to the Recommendation of the Committee of Ministers of the Council of Europe No. R (80) 2 concerning the exercise of discretionary powers by administrative authorities (adopted by the Committee on 11 March 1980 at its 316th meeting), discretionary power means a power which leaves an administrative authority some degree of latitude as regards the decision to be taken, enabling it to choose from among several legally admissible decisions the one which it finds the best under specific circumstances while both alternatives are lawful *(Resolution of the Supreme Court of Ukraine of 27 February 2018 in the case No. 816/591/15-a)*.

Legal theory and practice have developed a number of requirements for the exercise of discretionary powers, including the requirement that the authorities apply discretionary powers for the very purpose for which they were granted, with due regard for the principles of objectivity, impartiality, striking the right balance between adverse consequences for the rights, freedoms and interests of individuals and the aims with which relevant decisions were made, prudence and timeliness (within a reasonable time), and in accordance with the scope and nature of relevant discretionary powers granted to public authorities; equality before the law; compatibility between with the nature of supervision and the powers of supervisory bodies; transparency of information. Legislation should also provide for clear and adequate protection from arbitrary interference in entrepreneurship.

3. Judiciary review of discretionary powers of public authorities

Is judiciary review provided regarding how public authorities and their officials exercise discretionary powers? Is insufficient justification of discretionary powers exercised by public authorities and their officials

the reason for appealing their decisions in court?

Is there a review in place by the Constitutional Court of discretionary powers exercised by the Parliament?

Is the review by the Constitutional Court of discretionary powers exercised by the Parliament effective?

Is there a review in place by the Constitutional Court of discretionary powers exercised by other public authorities?

Is there a review in place by the Constitutional Court of discretionary powers exercised by the President?

Is the review by the Constitutional Court of discretionary powers exercised by the President effective?

Is there a review in place by the Constitutional Court of discretionary powers exercised by other public authorities?

Is the review by the Constitutional Court of discretionary powers exercised by other public authorities effective?

Is there a review in place by administrative courts of discretionary powers exercised by public authorities?

Is the review by administrative courts of discretionary powers exercised by public authorities effective?

Commentary

The entire system of constitutional guarantees is aimed at the proper exercise of discretionary powers within the framework of the law. All public bodies and legal institutions of the state should act in accordance with this system of guarantees.

As the application of discretionary powers is related to choosing among alternative decisions or with evaluative actions, the process of adopting relevant decisions requires special, impartial and effective control. A judicial review by independent courts is one of the most effective forms of such control in a civilized society. The main work burden in protecting human and citizen's rights from violations by public bodies exercising discretionary powers falls on courts. Therefore, effective protective actions by judicial authorities are extremely important for the state, society and individuals. They determine the level of the

legal protection of human and citizen's rights when public authorities exercise their discretionary powers as one of the important indicators of proper administration of justice.

Under Article 55 of the Constitution of Ukraine, everyone is guaranteed the right to challenge in court the decisions, actions or omission of bodies of state power, bodies of local self-government, officials and officers.

Each of the branches of the judiciary has a special competence in reviewing compliance with the Constitution and the laws of Ukraine by relevant public authorities when applying discretionary powers.

The Constitutional Court of Ukraine is designed to exercise a constitutional review of the acts of the Verkhovna Rada, President and the Cabinet of Ministers of Ukraine, by deciding whether laws and, whenever prescribed by the Constitution, other acts are compatible with the Constitution of Ukraine. Official interpretation of the Constitution belongs also to its responsibilities.

The system of administrative courts should, among its other functions, settle, in a fair, impartial, unbiased and timely manner, disputes under public law to effectively defend rights, freedoms and interests of individuals from violation by authorities exercising discretionary powers. Administrative courts have jurisdiction to consider administrative cases related to the legality, that is, compatibility with laws and legal acts of higher precedence (excluding the Constitution) of resolutions and orders of the Cabinet of Ministers of Ukraine, resolutions of the Verkhovna Rada of the Autonomous Republic of Crimea, ministries, other central executive bodies, the Council of Ministers of the Autonomous Republic of Crimea, local state administrations, local self-government bodies, other authorities. Individuals against whom a legal act is applied and individuals who are persons at law in the relationships where such act will be applied have the right to appeal against such act.

Under Article 2 of the Code of administrative proceedings of Ukraine, the function of administrative judicial proceedings is the judicial settling of public law disputes in a fair, impartial and timely manner to

effectively protect rights, freedoms and interests of individuals and the interests of juridical persons from violations by authorities. The Code of administrative proceedings of Ukraine lists, in particular, among the criteria pertaining to judicial review of the exercise of discretionary powers the following: compatibility of an adopted act with the aim of discretional powers, those powers themselves and the means of exercising them, justification (due regard for all circumstances relevant to the decision), impartiality, integrity, reasonableness, compliance with the principle of equality before the law and prevention of discrimination, proportionality (striking adequate balance between any adverse consequences for rights, freedoms and interests of individuals and the aims pursued by such decisions), the timeliness of adoption, that is, adoption within a reasonable time period (the shortest possible time to consider an administrative case and decide on it, sufficient to provide, timely and without any unjustified delay, judicial protection of violated rights, freedoms and interests in public law relationships). A court may suspend a legal act or declare a legal act wrongful (unlawful or incompatible with an act of law of higher precedence) or invalid, in full or in part (Article 264 of the Code of administrative proceedings of Ukraine).

4. Sanctions for the abuse of powers

Are there any legislative means and methods of preventing abuse of powers?

Are the legislative means and methods of preventing abuse of powers sufficient and effective?

Do public authorities and officials timely respond to any abuse of powers?

Is it possible to challenge the abuse of powers by the Parliament in court?

Are the mechanisms for appealing in court against the abuse of powers by the Parliament accessible and understandable?

Is it possible to challenge the abuse of powers by the President in court?

Are the mechanisms for appealing in court against the abuse of powers by the President accessible and understandable?

Is it possible to appeal against the abuse of powers by executive bodies and their officials?

Are the mechanisms of appealing against the abuse of powers by executive bodies and their officials accessible and understandable?

Is the principle of inevitability of sanctions for the abuse of powers by executive bodies and officials enforced?

Is it possible to appeal against the abuse of powers by a judge? Are mechanisms of appealing against the abuse of powers by judges accessible and understandable? Is the principle of

inevitability of sanctions for the abuse of powers by judges enforced?

Commentary

The existence of mechanisms for prosecuting the abuse of discretion is a final essential element in the legal structure of the exercise of discretion. To this end, **the law should provide** a clear and effective system of judicial, administrative or other forms of extra judicial control (in particular, the ombudsman) in order to prevent abuse of powers by certain public authorities and officials. This system should provide an opportunity to appeal to bodies that the law identifies as competent to deal with such issues, to challenge relevant unlawful actions and to demand that officials abusing their discretion be brought to justice. The Constitution and laws in force give also an opportunity to appeal in court against the abuse of powers by any state or self-government authority and its officials (this applies to the Verkhovna Rada, the President and the Cabinet of Ministers of Ukraine, all executive bodies and their officials, prosecution bodies, judiciary, etc.). Article 266 of the Code of administrative proceedings of Ukraine establishes general order of appeal proceedings concerning acts, actions or failure to act by the Verkhovna Rada, President of Ukraine, High Council of Justice, High Qualification Commission of Judges of Ukraine, Qualification and Disciplinary Commission of Prosecutors,

etc. Following the consideration of administrative cases, courts may declare acts of the Verkhovna Rada of Ukraine, the President of Ukraine, High Council of Justice, High Qualification Commission of Judges of Ukraine, Qualification and Disciplinary Commission of Prosecutors, etc., unlawful and invalid either in full or in part; declare actions or failure to act by these bodies unlawful and oblige them to take certain actions; determine other consequences of such decisions (for example, determine the presence or lack of powers of a certain authority or official; recover funds from the defendant (authority or its officials) to compensate for damages inflicted by unlawful decisions, actions or a failure to act; decide on another remedy to protect human and citizen's rights, freedoms and interests or the rights, freedoms and interests of other persons at law engaged in public law relationships from violation by authorities and officials, which would not contradict the law and ensure the effective protection of such rights, freedoms and interests.

The legislation of Ukraine provides also for administrative and criminal liability for committing offences in the exercise of discretionary powers, applying differentiated approaches to determining sanctions, and, in particular, criminal ones, for abuse of power, depending on the persons at law which committed such abuse.

As for the President of Ukraine, he or she can be brought to justice during his or her term of office only through the procedure of impeachment and only for committing treason or another crime (Article 11 of the Constitution of Ukraine).

Wrongful use of discretionary powers may contain an indication of in-service offences (in particular, abuse of office, abuse of power or official authority, corruption, etc.).

The law also determines the possibility of appealing against the abuse of power by judges, access to the procedure for such appeal and its clarity, the possibility of prosecuting a judge for repeated violations of law in adopting decisions or for manifestly unlawful decisions, which is one of the guarantees of protection of an individual from the arbitrariness of the judiciary in a democratic society.

The system that prevents abuse of discretionary powers **must operate effectively** and not be declarative, it should provide that **inevitability of punishment** for unlawful use of discretionary powers is attained. Avoidance of liability for unlawful actions or lack of response to abuse of powers by any authority is an indication of a derogation from the requirements and standards of the rule of law.

ACCESS TO JUSTICE

According to part 2 of Article 3 of the Constitution of Ukraine, "Human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State. The State is answerable to the individual for its activity. To affirm and ensure human rights and freedoms is the main duty of the State". Implementation of the right to access to justice is a guarantee of ensuring human rights and freedoms, which imposes relevant obligations on the state.

Part 1 of Article 55 of the Constitution of Ukraine contains a general provision providing for the right of everyone to appeal to a court if his or her rights are violated or their implementation is obstructed or rights and freedoms are otherwise infringed. This provision imposes on courts an obligation to accept applications even if the law has no special provision regarding judicial protection.

The refusal of a court to accept claims and other applications or complaints that meet the requirements established by law is a violation of the right to judicial protection, and Article 64 of the Constitution provides that it cannot be restricted even if martial law or the state of emergency is declared.

The judiciary plays a decisive role in the protection of human rights and ensuring the rule of law in a democratic society. It is absolutely logical because it is the court that marks the end in the search for and consolidation of law in deciding specific cases and it is it that embodies (or at least should embody) impartiality, unbiasedness and justice. The final judgment must be definitely enforced, this being an inalienable element of the right to access to justice. The higher the authority of the judiciary and justice in the country and the greater the independence of the judiciary in its relations with the legislature and the executive, the

higher is the level of compliance with the rule of law and democracy by the state itself and the more securely human rights and freedoms are protected from possible encroachments on them.

The organisation and work of the judiciary are based on a number of principles that are rather different by their content and scope. The principle of independence of the judiciary and judges is the starting point and the most decisive one among such principles in the modern state. It reflects most precisely the idea of the autonomy of the judicial branch of government in the system of its distribution.

Independence of the judiciary has a number of aspects (institutional, functional and personal (independence of judges)).

The institutional independence of the judiciary lies primarily in the fact that the power is entrusted to judges who are bearers of this power and exercise it independently of the legislative and executive branches of government.

No one, whether the head of state, the prime minister, a member of the parliament, a member of the government or any other official, may interfere in the performance by the judiciary and judges of their judicial functions.

An essential guarantee of the independence of the judiciary and judges is the availability of a democratic procedure for the formation of the judiciary, which makes impossible any influence on this process, and even more so the pressure on it by other branches of government, or social or political institutions.

The functional independence of the judiciary and judges is determined primarily by their impartiality, or the right and responsibility of the judiciary and judges to adopt decisions independently, impartially, exclusively on the basis of the Constitution and the law, and being guided by the rule of law.

An important guarantee of an objective, impartial and fair administration of justice by a judge is also the principle of judicial immunity, enshrined mainly in the constitutions and aimed at protecting judges

from possible external unlawful influence on them in the course of their professional practice.

Personal independence of a judge is determined by his or her personality: the level of his or her competence, moral character, etc., and not by the Constitution and the laws alone. This aspect of independence of judges is reflected in the following:

- judges should administer justice regardless of their political views and beliefs, which cannot be prohibited by any law (contrary to the prohibition of membership in political parties);
- obedience of a judge to laws adopted under a democratic procedure does not mean formal observance of its letter or ignoring the general principles of law and other values enshrined in the Constitution, international legal instruments and international case-law; this presupposes that a judge has wide legal expertise;
- it is obligatory for a judge to reason an adopted decision by provisions of law, general principles of law, other its values and reconcile his or her decisions with the relevant well-established judicial practice;
- if a judge expresses excessive "irregularity" in adopting decisions, it may give rise to a violation of an important principle of justice, which says that it is essential that similar decisions be made in similar cases, this being a prerequisite for the unity of judicial practice and efficiency of judicial proceedings;
- a judge should approach any his or her participation in the professional legal activity beyond the judiciary, in particular, in various expert institutions, in such a manner that it shouldn't contradict an independent performance of the main judicial function of administering objective, impartial and fair justice.

This indicates that the ***independence of the judiciary*** and judges is determined by the level of maturity of civil society, the level of legal culture of the legislative and executive branches of government and the judiciary itself and not only by the quality of the legislative framework that should comply with modern global and European values

and standards, on which the judiciary and the judicial proceedings are based.

1. Constitutional safeguards for the administration of justice

Does the legal act comply with the principles of the organisation of the judiciary?

Does the legal act ensure the impartiality of the procedure for the establishment of courts?

Does the legal act ensure the impartiality of the procedure for the appointment of judges?

Are the objective criteria for the appointment of judges legally established?

Does the legal act provide for the participation of individuals in the administration of justice?

Doesn't the legal act give rise to a violation of the principle of unbiased legal proceedings?

Are the grounds for imposing disciplinary or criminal sanctions on judges linked with serious violations?

Is it provided that preliminary consent by the judicial self-government body is necessary to open criminal proceedings against a judge?

Are the grounds for dismissing a judge exhaustive? Is the independent operation of the Council of Justice ensured?

Commentary

The presence of the judiciary is one of the main criteria for the existence of a democratic state, as the judiciary is, in the classical system of checks and balances, the branch of government that is perhaps the most responsible one for the consolidation of the principle of the rule of law and ensuring human rights and freedoms. Often it is for people

the last instance to which they could have recourse in order to bring about justice. This is why courts should be accessible for citizens and other people legally residing in the territory of the state and people have a justified right to expect that courts will protect them from unlawful infringements by any persons at law. The courts, in order to efficiently perform their function, should be in fact independent, objective, impartial, competent and suffer not from financial or any other material hardships. The judiciary would enormously benefit from being staffed by people who would have a high moral character in addition to the criteria mentioned above.

At the same time, clear constitutional guarantees of administration of justice, which should establish essential prerequisites for the independence of judges, support their work and protect them, as well as safeguards for judges, which would help them and encourage them to administer justice honestly and professionally, should be recognized as the foundation of the effective functioning of the judiciary. To this end, such constitutional guarantees should meet a number of criteria mentioned below.

In particular, it should be clarified **whether a certain legal act is compatible with the principles of organisation of the judiciary**. Such principles, taken from among all their multitude, on which the judiciary of all civilized states is based, are, in particular, as follows: the principle of judicial independence, which provides that courts and judges should not in any way depend on anyone else, should not be influenced by anyone, as well as the principles of objective appointment of judges and adequate material support of courts and judges. These principles should guarantee an adequate environment for administering justice in the country.

A law on the organisation of the judiciary should clearly envisage **procedures for the establishment of courts and appointment of judges**. In particular, the establishment of courts should be informed of many factors, in particular, the fullest possible assurance of the needs, rights and interests of people who would have recourse to a specific court to seek justice. Factors such as the proximity of a court to the

place of residence of persons, their occupation and status (individuals or legal entities), the potential number of persons who would apply to the court, office hours, conditions for conducting hearings, and the accessibility of the courthouse itself for people with different needs, should be taken into account. Equally important factors are the number of judges, their competence and working conditions for them and for the staff supporting the administration of justice. The law should also provide for the responsibility for violating relevant procedure rules related to the establishment of courts.

There are also a number of objective criteria for the appointment of judges. The competency and integrity of judges and their ability to perform important and complex work should be comprehensively scrutinised and their previous activities should be evaluated also. Judges who decide the fate of people must be subject to the strictest requirements in all respects, because for ordinary people judges primarily embody the state and its power, and therefore, courts should be staffed with judges in respect of whom there are absolutely no doubts about their competence, impartiality, unbiasedness, fairness and honesty. The laws should ensure, by their regulation, that such complex requirements are met.

Participation of citizens in the administration of justice is an additional criterion pertaining to the rule of law. The very essence of the judiciary is that, although the people, as a rule, do not directly elect it, it acts on their behalf, and representatives of people can participate in it. In many countries, people participate in the administration of justice through a jury trial. Each country has its own specific rules for its establishment and powers. In other countries, there is an institution of people's assessors instead of jurymen, they are involved in the hearings together with professional judges. Regardless of the system adopted in a particular country, the principle of the rule of law requires that representatives of the people participate, in one form or another, in court hearings and be involved in the administration of justice, that is why a law (a legal act) should also outline this aspect.

Other aspects are related to the personality of a judge, when, in particular, the **law** (**normative act) does not regulate how to ensure the principle of impartiality of the proceedings**, does not determine **serious violations, of which a judge can be held criminally or administratively liable, the consent to be given by the judicial self-government body to hold him or her liable, or the exceptional nature of grounds for removal of a judge from his or her office**. They are characterized by the establishment of a clear framework within which any judge should administer justice. Such framework should be established by law. The role of the judicial self-government body is especially distinct among the roles mentioned above. There is a natural need for it as the judiciary has no other collegial bodies responsible for the conduct of its representatives. Unlike the legislature, which is represented by a collegial parliament, the judiciary establishes judicial self-government bodies that must be involved in the processes outlined above and even control that judges be dismissed only on the grounds provided by law. And, what is more, such grounds should be **of an exceptional nature**. It makes these law provisions as efficient as possible.

In addition, the law should define that **the Council of Justice operates as an independent body** through which both judges and representatives of other authorities can influence the judiciary to restore the balance of power if, for some reason, it is violated.

2. Independence of the judiciary

Does the legal act exclude any external and, in particular, political pressure on the administration of justice?

Doesn't the legal act affect the independent manner of the appointment of judges?

Doesn't the legal act affect the change of the maximum term of office of judges?

Doesn't the legal act provide that a judgment be possibly reviewed otherwise than by a higher court?

Doesn't the legal act interfere with the competencies of courts/judges that are clearly determined?

Are cases distributed among judges following objective and transparent criteria?

Are the instances where a judge is removed from proceedings excluded, save for instances where a judge is recused or recuses him/herself?

Doesn't the judge's functional immunity prevent from imposing sanctions on him or her in the event of disciplinary misconduct?

Is an independent and legitimate election to the Council of Justice of representatives of judges, lawyers, and the public ensured?

Is there a sufficient and fair remuneration for judges?

Does the law provide for anti-corruption measures in the system of justice?

Commentary

Independence of the judiciary is one the most important (if not the most important) of its features. It is the main prerequisite of a democratic state recognising and introducing the principle of the rule of law. The independence of the judiciary together with the fairness of judges creates social trust in this branch of government. Courts are independent when such a system of guarantees for the administration of justice exists, which would make it impossible to influence the judiciary as an autonomous branch of government, judges as holders of such power and the entire process of administration of justice by any other authority or another person at law. At the same time, other authorities may exert influence, but only within a system of checks and balances and only in a manner clearly provided by law. Material independence should be mentioned among important aspects of independence.

The court is not a commercial enterprise and cannot make money. Therefore it should be funded by the executive bodies under the budget approved by the legislature. At this stage, the system of checks and balances often fails, undermining the whole system and placing

courts and judges in financial dependence on the executive and legislative bodies and individuals representing them. Besides the financial aspect, a law on the judiciary, in order to be compatible with the rule of law, should meet a number of other criteria, including those discussed below.

It should **render impossible any external and in particular political pressure on the administration of justice**. To accomplish this ambitious task, the law should create an effective mechanism for the judiciary to respond to possible facts of pressure on individuals (judges) within it and the judiciary as a whole. The history of foreign judicial systems demonstrates that its important element is the presence of a developed and efficient civil society to control these processes from the outside, as well as the high moral character of judges and other officials, who would not consider civil service (whether as judges or other civil servants) as a means of satisfying their material needs, but would consider it as an actual service through the lens of the principles underpinning it.

The independence of judges begins from the time of their appointment so that no law (legal act) should **adversely affect the independent procedure for appointing judges**. This means that no legal acts should impose any additional restrictions on the appointment of judges or special procedures for it that would affect the process in such a manner that there are any slightest doubts about the independence of their selection or appointment.

Similar to the previous criterion, legal acts **should not affect the maximum length of service of a judge**. This means also that legal acts should impose no additional restrictions on certain judges already elected or appointed for a relevant term. The principle of the rule of law prohibits amending the maximum length of service of judges by new legislation.

Another criterion relates to the process of administration of justice, and establishes that **no legal act should provide for a review of a judgment otherwise than through reviewing it by a higher court**. Best international practices demonstrate that a standard method of

reviewing judgments exists in the judicial systems and is based on the availability of appellate and cassation courts, designed to ensure the fairness and legitimacy of judgments. This means that a legal act should not establish any other means of reviewing judgments than those established as a standard. It is not allowed to create additional quasi-judicial bodies that would review such decisions, bypassing the established procedure.

Another requirement for a legal act is that **it should not breach the jurisdiction of a court or a judge**. This criterion stems from the very essence of the system of checks and balances, which assumes that each branch of government is responsible for its own sphere, so that no one else can be vested with the powers of a judge, just as no judge can be granted powers of other public authorities.

An equally important criterion belonging to that principle is also the **distribution of cases between judges under fair and transparent criteria**. In a state that declares and implements the principle of the rule of law, biased court officials should not distribute cases. A system exists for that end, not being subject to influence from either court officials or judges. A relevant legal act has the mission of prescribing a mechanism to provide for an independent and impartial automated distribution of cases among judges of a particular court.

The next criterion relates to **excluding the possibility of removing a judge from proceedings, save for the instances when a judge is recused or recuses him/herself**. It provides that it is not permitted to remove a judge from considering a case, save for the instances when parties have declared his or her recusal or a judge recuses him/herself from the case. If this criterion is replaced by another, it should be regarded as a violation of the principle of independence of the judiciary and the principle of the rule of law in general.

Similarly, this concerns instances when **the functional immunity of a judge prevents imposing sanctions on him or her if he or she has committed disciplinary offences**. The legal acts should establish a mechanism to prevent judges from referring to their immunity to escape sanctions if they commit disciplinary offences.

Another criterion concerns the **independence and legitimacy of the election to the Council of Justice of representatives of judges, lawyers, and the public**. This factor affects the independence of judges and the perception of the judiciary by public and professional circles, including lawyers.

The last but not the least criterion is that **law should provide for anti-corruption measures in the system of justice**. Corruption along with possible ineptitude are the main challenges for the system of justice. This is why provisions of the law should outline an objective mechanism to prevent manifestations of corruption in the system of justice.

3. Fair trial

Does the legal act provide for access to justice?

Does the legal act provide equal rights in the process of the administration of justice?

Does the legal act provide for the openness of legal proceedings? Is the adversarial process ensured?

Does the legal act ensure the right of an individual to be heard?

Does the legal act ensure the right to legal aid? Doe the legal act in an appropriate manner ensure the right to defence?

Is the possibility of recusal of a judge ensured?

Does the legal act provide for reasonable time limits of legal proceedings?

Is the right to appeal judgments guaranteed?

Commentary

Fairness of the administration of justice, along with its independence, is considered to be perhaps its most important characteristic, as it is the fair trial that ordinary people seek, and it is primarily through this lens that they assess the quality of administration of justice in the

country. At the same time, *fairness* is a rather not well-established and vague notion, difficult to be defined precisely both in theory and in practice. The purpose of fairness is to ensure that no one in society feels offended (the subjective aspect of fairness) and the benefits available to individuals (as well as the responsibilities) would be distributed with the best possible account for the contribution of each individual into social activity (the objective aspect of fairness). As it was noted above, a clearer definition of fairness by arithmetic methods remains impossible at the current stage of technology development.

In particular, due to current trends in the automation of processes, it has repeatedly been proposed to include legal proceedings in it. A great number of aspects of this process have been resolved through automation, however, no automated system to date has been able to introduce a fair dispute resolution. Examples of automated judiciary systems that exist in the world cover only arbitration proceedings and concern only the simplest cases, in particular those where the aspect of fairness can be equalled with the aspect of equality. That is why, to ensure a fair trial, people are necessary with life and professional experiences and knowledge of what injustice is, and therefore it should be underlined that the fairness of a judgment should be based on criteria that are unique to each case, although of course, this does not exclude the requirement to comply with a number of other criteria listed below.

In particular, for legal proceedings to be fair, **a legal act should provide access to them**. This means individuals should not meet any artificial obstacles in their access to courts. Courts should be open for individuals, their complaints and claims, because, as it was already discussed in previous sections, a court is often the last recourse for an individual after he or she failed to find satisfaction with other state authorities. It is not allowed to create special courts without access to them for ordinary people, introducing privileges for certain categories.

Besides, the fairness of legal proceedings provides that **equal rights be ensured when justice is administered**. Equality of rights means, first of all, equal opportunities for parties to proceedings under the same circumstances, meaning that no advantages or privileges should

exist for any party at a trial. Exactly this mechanism should be provided by a legal act.

Adversariality is an equally important aspect of a fair trial. An adversarial trial is such where each party does not only have equal access to the legal proceeding and equal rights [in the process] but also has every opportunity to compete with the other party (or parties) by presenting evidence and convince judges and the other party of them being right. To this end, the law should provide for a system of rights and obligations of parties that would allow them to collect evidence and submit it to court, as well as to receive necessary assistance from the court in obtaining evidence if the parties have difficulty in independent collection of it.

An additional aspect of a fair trial is that laws (legal acts) should provide **the right to be heard** for the parties. This means that even if the system provides for written proceedings or some other their type without summoning the parties, each party should have a reasonable opportunity to give explanations and outline its arguments. This right does not necessarily have to be provided orally as it can also be provided in writing or in some other form, however, the essence of the right of a person and the right of a party to express his or her position, provide relevant explanations or evidence or respond to what the other party argues should be guaranteed.

The **right to legal aid** is another right important in the context of the fairness principle. It is the inalienable right of each person, as no one is obliged to have legal education but everyone has the right to receive professional legal aid in his or her case. The **right to defence** is correlated with this right as it means not only legal aid but a full representation of the interests of a person in court.

Another aspect of the fairness of a trial is the **reasonable nature of the length of trial** which does not allow the judiciary to protract with the consideration of a case for more time than is really necessary and is reasonably justified. Violations of this rule often give rise to applications against Ukraine to the European Court of Human Rights which more

than once stated that many European countries, including Ukraine, have yet many problems in this respect.

An opportunity for a party to recuse a judge is another important aspect of the fairness of a trial. Under certain circumstances, the parties may feel that the judge is not able to consider their case objectively, independently, impartially and unbiasedly, and they must have an opportunity to declare it and present their evidence and opinions on the matter. Such opportunity should be provided by the law regulating legal proceedings.

Another and perhaps most important right is the **right to appeal court decisions**. This right is fundamental for the system of legal proceedings and gives a party the opportunity to apply for a review of the decision to a higher court, which has the power to overturn decisions of lower courts. Fairness is ensured in such a way, as there is an opportunity to cancel or review an unfair decision.

4. Judicial constitutional review

Are objective and independent procedures for the election/appointment of the judges of the Constitutional Court ensured?

Are criteria for the selection of judges in terms of their independence, professionalism and competency ensured?

Are organisational and financial guarantees for the Constitutional Court to be able to function ensured?

Is the independence of judges of Constitutional Court guaranteed, in particular, in terms of their bringing to justice?

Is there regulation of who may apply to the Constitutional Court and on what grounds?

Are the principles of constitutional review ensured, in particular, the rule of law, independence, collegiality, publicity and the well-grounded and binding nature of decisions and conclusions being made by the constitutional review body?

Aren't there any obstacles for an individual to implement his or her right to apply to the Constitutional Court to defend his or her rights?

Do public authorities review their legal acts in the light of the arguments and decisions of the Constitutional Court?

Does the Parliament eliminate gaps and conflicts revealed by the Constitutional Court?

Do trial courts review their decisions in the light of the legal positions of the Constitutional Court?

Commentary

The constitutional review was introduced in European countries to ensure that the system of government has an independent arbitrator primarily tasked with the scrutiny of acts issued by the legislature and the executive for their compliance with the Constitution and with interpreting the Constitution [and other laws]. Different countries have somehow different models of constitutional courts. However, in order that a constitutional review might be ensured within the rule of law, it should meet the criteria outlined below.

In particular, a law (a legal act) should establish **unbiased and independent procedures for election/appointment of the judges of the Constitutional Court**. This means that people dependent on someone or incompetent in matters of constitutional jurisdiction should not end up through the back door as members of the Constitutional Court.

The provision of constitutional review requires in addition that a legal act introducing and regulating it should ensure **criteria for selection and additional recruitment of judges (independence, professionalism, competence)**. As mentioned above, a judge of the Constitutional Court should be independent of anyone, professional, meaning that he or she should have the appropriate level of education and expertise, and competent, meaning that he or she must be able to consider cases of constitutional jurisdiction, and to this end he or she should have, in addition to just legal expertise, professional experience in the field of constitutional law, as well as the broader expertise that will allow him or

her, in addition to resolving cases, to anticipate also the consequences of his or her decisions.

An equally important criterion of ensuring constitutional proceedings is the **provision of organizational and financial guarantees for the functioning of the Constitutional Court**. This requirement looks completely natural among other requirements of this kind. No system can be effective without good organisation and adequate functioning. A law (a legal act) should provide a relevant mechanism to ensure such guarantees.

Another aspect is **the provision of guarantees of independence of the judges of the Constitutional Court, in particular, in terms of their bringing to justice**. The responsibility of a judge of the Constitutional Court is an important aspect of his or her work, as the judge is responsible for important decisions on which the destiny of many people, and often of the whole country, depends. Therefore, a law (a legal act) should provide for such a system of responsibility of a judge for his or her decisions, which would include nothing capable of affecting his or her independence, but at the same time contain clear criteria, the procedure for responsibility and guarantees of the inevitability of a sanction if the violation is effectively proven.

Another important aspect of the constitutional jurisdiction is its openness, which means that law **should provide grounds for applying to the Constitutional Court and the list of persons who have the right to such appeal**. As the Constitutional Court decides only on the most important cases, it is not appropriate for it to spend its time and resources on trivial issues. Therefore, a law (a legal act) should establish a clear list of persons entitled to apply to the Constitutional Court, as well as a clear list of grounds for such applications, which should ensure that the Court considers only the most important and socially significant cases.

Besides that, the law (legal act) should provide for **the principles of constitutional review** (**rule of law, independence, collegiality, publicity and well-grounded and binding nature of decisions and conclusions which the Constitutional Court adopts)**. These principles

are the basis for any judicial review, however, since the constitutional review concerns the most important aspects of the functioning of the state and society, they play here a particularly important role.

Another aspect of the constitutional review is **an easy exercise by an individual of the right to apply to the Constitutional Court to protect his or her rights**. This aspect is correlated with the above-mentioned aspect of providing grounds for applying to the Constitutional Court and a list of persons entitled to such application, but these two aspects do not contradict each other, as there are aspects under which the Constitutional Court should be an institution that is open in the most possible way to average individuals. In Ukraine, as in a number of other countries, the institution of a constitutional complaint has been, for example, introduced to this end.

The last two aspects in the list (but not the last by their importance) are **the obligation of public authorities affected by a decision of the Constitutional Court to review their decisions, laws and regulations, with due regard to the arguments outlined in the decision of the Constitutional Court. In particular, it concerns the Parliament and courts of general jurisdiction**. This aspect is one of the most important ones as it has to ensure the efficient functioning of the body of the constitutional jurisdiction. This means that, when the Constitutional Court, considering a certain case, finds out certain provisions of a legal act indicating that a public authority has violated the constitutional provisions, such a violation should be rectified. Moreover, as a rule, the decisions of the Constitutional Court explain which provisions of the Constitution have been violated, and, in addition to that, the Constitutional Court recommends that the bodies on which the amendment of such acts depends do so. This is also true in relation to courts of general jurisdiction which must not, following the decision of the Constitutional Court on a specific matter, interpret relevant legal norms contrary to how the Constitutional Court did it.

5. The state of execution of judgments

Are the requirements as to the clarity, preciseness and comprehensibility of court decisions outlined in the legislation in an appropriate manner?

Are there any obstacles impeding access to court decisions?

Is the legal procedure for the enforcement of judgments outlined in a comprehensive and thorough manner?

Is the procedure for guarantees (restriction of the rights of a person) of enforcing a judgment outlined in a comprehensive and sufficient manner?

Does the body that enforces judgments have sufficient organisational and financial capacities?

Is there a provision for alternative opportunities for claiming enforcement of a judgment through legal means?

Is the procedure for appealing against non-enforcement of judgments efficient?

Does the state (local) budget provide for expenditures to enforce judgments or redress for non-enforced judgments?

Is the liability for the non-enforcement of a judgment by the person who is under obligation to do so regulated and ensured in a sufficient manner?

Is the procedure for bringing the state to justice for non-enforcement efficient?

Commentary

In order for the principle of the rule of law to be effective, it is not enough that the judiciary is independent and judges are competent and honest, as court decisions should be executed too. Execution of a judgment is the last stage of the relationship between a person and the judicial system, in fact, it is the mere thing for which a person applies

to it. Non-enforced judgments minimise their value for both people and the system of government, as in such a way the balance between different branches of government is being lost. Two other branches of government have the task of enforcing judgments and not only of providing an adequate working environment for the judiciary. The legislature should envisage such a mechanism in the laws and the executive should in fact provide the enforcement of decisions made by courts. To provide for this aspect, a legal act should establish the following criteria.

First, **legislative requirements as to the clear, precise and comprehensible nature of a judgment** should be outlined **in an appropriate manner**. This means that the judgment should be outlined without any veiled elements, that is, in such a way that anyone can understand what the court has decided, without resorting to experts who should have explained to him or her what the decision is about. Clarity, in turn, means that the essence of the decision is perceived unambiguously, without any different interpretations. Besides that, the notion of clarity means that a person at law can envisage the results of their own actions, which is also an important feature of the rule of law.

In addition to this criterion, **free access to court decisions** is also important. It is ensured by publishing court decisions in print and in electronic database which would include court decisions. The Unified state register of court decisions is the Ukrainian example of such a database. Decisions adopted by courts should be accessible for people for whom it is appropriate to have an opportunity to be aware of what the court decided in their case or in the cases of other individuals or legal entities.

Another criterion is the **comprehensiveness and thorough nature of the legal procedure for the enforcement of judgments**. Enforcement of judgments is an important appanage of the judicial system. Whenever a party does not want to execute a judgment, the law should outline the procedure for its enforcement, well-grounded in economic and legal terms. In addition to this criterion, the law should also prescribe **the scope and sufficiency of the outlined procedure for the guarantees**

(the restriction of the personal rights) to enforce the judgment; the above-mentioned is an element of the previous criterion as, when it's lacking, the procedure for the enforcement of a judgment would be incomplete.

A similarly important criterion is the **sufficient financial and organisational capacities of the bodies that enforce judgments**. This is primarily about state enforcement agents which should get such provision from the government that it would meet the above-mentioned criteria. At the same time, it equally concerns the institution of private enforcement agents recently introduced in Ukraine, who should be selected, in particular, with due regard to the criteria mentioned above.

In the development of the previous criterion, it is worth mentioning that the law should also outline **a provision for alternative opportunities for claiming enforcement of a judgment through legal means**. Private enforcement agents are such an alternative opportunity in Ukraine. It was introduced, in particular, to give individuals an opportunity to choose whether to recourse to state enforcement agents dependent on the government, or to private bailiffs who are not so dependent on the government as their public colleagues.

An effective procedure for appealing against the non-enforcement of a judgment is also an important criterion. As it was already discussed in the previous sections, the procedure per se of appealing court decisions is an important element of the rule of law. It is even more important if it is the procedure that led to the non-enforcement of a judgment that is appealed against, as it goes against the requirements of the rule of law principle if not executed. The procedure for appealing a non-enforced judgment should, in order to be effective, necessarily provide for the liability of officials who were obliged to enforce such a decision but failed to do so due to certain reasons.

However, financial support is necessary to provide for compliance with the criteria mentioned above. Therefore, an important aspect of compliance with the principle of enforceability of judgments is **earmarking expenditures in the state budget or in local budgets for the enforcement of judgments or redress for non-enforced**

judgments. In fact, this aspect is self-evident, as the enforcement of judgments requires financial support to be provided by the state budget or local budgets.

The next criterion is **sufficient regulation of liability for the non-enforcement of a judgment by a person who is under obligation to do so and ensuring that such liability would function**. A similar aspect was already discussed earlier. This criterion is based on a premise that a person responsible for the enforcement of a judgment should be liable if it was not enforced in an appropriate manner. However, such procedure for bringing to justice should be clear, well-grounded, regulated and effective. A relevant law should provide exactly for such mechanism.

And the last criterion is **the effectiveness of the procedure for the liability of state if a judgment is not enforced**. This procedure is different from the procedure of bringing to justice officials for the non-enforcement of judgments as, instead of a sanction inherent in the legal relationships with individuals (here, state officials), it mainly provides for the financial redress so that the effectiveness of this procedure depends primarily on the financial capability of a relevant state. However, it depends also on other factors, in particular, the clearness and comprehensibility of the procedure outlined in law and the effectiveness of authorities which must provide the functioning of this procedure.

FOR NOTES