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THE RULE OF LAW IN THE ECHR FRAMEWORK: THEORETICALLY-LEGAL OVERVIEW

ВЕРХОВЕНСТВО ПРАВА У ДІЯЛЬНОСТІ ЄСПЛ: ТЕОРЕТИКО-ПРАВОВИЙ ОГЛЯД

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The article deals with the functional features of the rule of law concept in European Court of Human Rights practice. The aim of this study is to provide a conceptual theoretical framework based on the assumption, that as the authority of the supra-national level, Court in its work had successfully used a so-called “evolutive” approach to the interpretation. Special attention is given to the classification of the approaches, according to which the rule of law is seen as the universal principle of the international judicial law-making process. The author concludes that: 1) the rule of law is a concept of the flexible and dynamic character; 2) there are reasonable grounds to distinguish two modes (forms) of the rule of law manifestation in the Court’s case law; 3) the rule of law also carries out the systematically important for the ECHR functions. Respectively, there is an urgent need to review provisions, existing in the Ukrainian legislation.
Key words: rule of law, European Court of Human Rights, law principles, evolutive interpretation, case law, anti-definitive approach, structurally systematic approach, clusters of the rule of law elements, rule of law functions.

У статті розглядаються функціональні особливості концепції верховенства права у практиці Європейського суду з прав людини. Метою поточного дослідження є розробка концептуальної теоретичної бази, заснованої на твердженні, що Суд, як орган наднаціонального рівня, у своїй діяльності активно використовує так званий «еволютивний» підхід до тлумачення правовідносин. Акцентується на класифікації способів, відповідно до яких верховенство права розглядається у якості універсального принципу міжнародної судової правотворчості. Автор доходить до висновку, що: 1) досліджуваний феномен є концепцією адаптивною та багатофункціональною; 2) наявні достатні підстави для виокремлення двох основних форм матеріалізації верховенства права у практиці Суду; 3) верховенство права також виконує систематично важливі для ЄСПЛ функції. Відповідно, існує нагальна потреба у перегляді діючих положень національного законодавства.
Ключові слова: верховенство права, Європейський суд з прав людини, принципи права, еволютивне тлумачення, прецедентна практика, анти-дефінітивний підхід, структурно-системний підхід, групи елементів верховенства права, функції верховенства права.

В статье рассматриваются функциональные особенности концепции верховенства права в практике Европейского суда по правам человека. Целью текущего исследования является разработка концептуальной теоретической базы, основанной на утверждении, что Суд, как орган наднационального уровня, в своей деятельности успешно использует так называемый «эволютивный» подход к толкованию правоотношений. Особое внимание уделяется классификации способов, в соответствии с которыми верховенство права рассматривается в качестве универсального принципа международного судебного правотворчества. Автор приходит к выводу, что: 1) исследуемый феномен является концепцией адаптивной и многофункциональной; 2) имеются достаточные основания для того, чтобы вести речь о двух основных формах материализации верховенства права в практике Суда; 3) верховенство права также выполняет систематически важные для ЕСПЧ функции. Соответственно, существует настоятельная необходимость в пересмотре действующих положений национального законодательства.
Ключевые слова: верховенство права, Европейский суд по правам человека, принципы права, эволютивное толкование, прецедентная практика, анти-дефинитивный подход, структурно-системный подход, группы элементов верховенства права, функции верховенства права.

Problem statement. European Court of Human Rights (hereinafter – ECHR or Court) acts as an effective way to protect and respect universal legal order. ECHR is perceived not only as an international court, which is able to restore the violated rights and freedoms, but also as a powerful institution that promotes doctrinally significant legal ideas. One of such an idea is the rule of law. Thus, the **relevance** of the topic can be academically explained by the following. The declared multifaceted rule of law nature reflects the need to develop a special methodology to its thorough examination, specifically from the judicial law-making perspective.

The main **purpose** of the article is to carry out a comprehensive analysis of the international rule of law concept on the basis of the ECHR case law. This will allow to complete more detailed study of rule of law normative construction, specifics of its model implementation into the Ukrainian legal practice. Aforementioned can be achieved through addressing the following scientific and practical **tasks**: 1) to show how the theoretically-legal justification for the rule of law idea in the international legal aspect works; 2) to undertake an in-depth methodological analysis of the modern rule of law concept in the ECHR law practice; 3) to define the main rule of law functions in the ECHR interpreting, in order to create an appropriate mechanism for the application of the relevant international law standards.

Reviewing existing literature on the subject. At the present time, the rule of law is an indispensable value for an effective operation of the national and international legal order. However, only certain Ukrainian legal theorists have carried out some issues, concerning the ECHR's understanding of the rule of law idea: S. P. Holovaty, O. M. Lutziv, A. A. Pukhtetska, P. M. Rabinovych. It is most regrettable that researches of the abovementioned scholars were conducted only fragmentarily. There is a little different situation in the foreign legal literature. For instance, among such scientific works, it is necessary to highlight G. Lautenbach's paper "The Concept of the Rule of Law and the European Court of Human Rights", where the author explained how the Court defines and interprets the notion of the rule of law in its practice [13].

At the same time, it is worth noting, in the Ukrainian legal theory this question should be examined more closely with the application of both complex and hermeneutic methods of scientific knowledge. Having analyzed divergent views, existing in the modern legal literature, the author underlined some **unsolved aspects** of the general rule of law problem: 1) the uncertainty of the rule of law position in the international judicial law-making; 2) the lack of studies, related to the impact of the ECHR "evolutive" interpretation on the development of the rule of law dynamic aspect; 3) the scientific invalidity of the ways, with the aid of which the rule of law concept can be materialized in the ECHR decisions.

By the same token, the **novelty** of the current research lies in the fact, the author used qualitatively new structurally-systemic approach to the understanding of the rule of law essence. In view of this, the actual **scientific value** of the work is crucial enough. For sure, the new methodological framework in the study of the rule of law will be recommended. The further suggested gives the opportunity to outline special scientific criteria, according to which the rule of law is a complex principle, comprised of a special guidelines series.

Main material presentation. It is notorious, the rule of law doctrine is complicated enough. Dozens of approaches to its notion definitely have enriched a time-honored concept. At the same time, international case law serves as a peculiar indicator of the rule of law dynamism, enhancing its efficacy on the global level. Consequently, it is imperative to analyze and systematize ECHR judicial decisions (not all, but some of them). This would help to avoid the overall impression about the researched phenomenon as the abstract and non-functional theoretically-philosophical ideal.

Today ECHR is a central factor in the successful European society functioning, considering it serves as a sui generis "nervous system" of the human rights protection. Therefore, in order to save the viability of the Convention for the Protection of Human Rights and Fundamental Freedoms (better known as Convention on Human Rights or simply Convention), unchanged for the half a century, it is of utmost importance for Court to have a special approach to the interpretation of particular conventional rules. That became known as the "evolutive" approach, directly revealed in ECHR's decisions for many times. Indeed, emphasis has been mainly on fact, that "Convention is not a static legal act, it is open for interpretation in the light of a new day". Moreover, "as a legal act, protecting human rights and freedoms, subject and the aim of the Convention requires its provisions to be interpreted and applied in a way that makes its guarantees real and effective" [18]. Accordingly, we have the reason to believe, evolutive approach in such understanding has provided universally recognized fundamental truth: "Convention's provisions exist in the form, they interpreted by the Court". Aforementioned leads to the conclusion, the rule of law in the ECHR's perception is not a static, but dynamic concept. This means researched concept is loaded with a new content through this type of interpretation.

As was mentioned, the ECHR's rule of law issue is also discussed in the professional academic literature. For instance, analyzing ECHR's rule of law, some Ukrainian scholars, particularly P. Rabinovych, suggested a so-called "element-by-element" analysis/approach. The underlying idea is in separation of sustained expression – "the Rule of Law" into two main "sub-elements" – "Rule" and "Law". Scholar deeply convinced, only these two legal categories detached from each other, will create a basis for the clear understanding of the rule of law as a whole concept. In this case, researcher "empowers" each of the above-listed sub-elements with their own options (attributes or characteristics) [17, p. 4–10]. It appears, such an uneven understanding introduces greater uncertainty concerning the use of the conceptual apparatus not only for the legal theorists, but also for the law-appliers. As a result, recommended approach seems incomprehensible for several reasons. By singling out notions "rule" and "law", immanent character of the researched concept is auto-

matically denied. Besides, what are theoretical and practical results for applying such an approach? Any logical division has its own specific goals. Thus, selection of an appropriate basis (for division) stems from such a goal. That means, the next question is whether one can semantically split the rule of law notion, if it is a concept, possessing itself as an independent legal tradition. Furthermore, there are no any grounds for the philology (as a science) to interpret the "rule of law" separately. Practically, linguistic theory is not familiar with such type of translation as dichotomy concept division with a view to description of its certain meaningful parts.

Position that there must be no application of "element-by-element" analysis in such a manner is further supported in the foreign legal literature. Specifically, we can find an opinion, the key idea of which is analytic formula as follows: "Rule" + "Law" ≠ "Rule of law". The most important aspect is not to consider the "Rule of Law" as the concept of mechanically united words ("rule" and "law"), but in possibility to create a holistic set of specific features, with the aid of which we percept "the Rule of Law" as a cohesive and universal legal phenomenon [12, p. 79-82]–. This view should be certainly supported and expanded, because artificial dichotomy division is at variances with the basic rules of formal logic. We are deeply convinced, detachment of the Rule of Law into two isolated words "RULE" and "LAW" and their separate study intentionally makes it harder to understand essential role of the current idea.

At the same time, we shall notice that instrumental value of the proposed above "element-by-element" analysis/approach is beyond any dispute. Simply, this should be done in a slightly different direction. For example, Stanford Encyclopedia of Philosophy suggests the Rule of Law "comprises a number of principles of a formal and procedural character, addressing the way in which a community is governed" [15]. In this context, as the rule of law is cohesive and coherent legal construction, reference should be made to its multifaceted character, unifying fundamental principles of global legal order. So as the result, this analysis should be applied not to the semantic side of the rule of law, but to its *internal structure*. Such-like point of view is supported by an outstanding Ukrainian scientist A. Pukhtetska. With the aim of determining particular rule of law elements, she extracted from the ECHR decisions its five dimensions. Among them are: 1) simple references to the content, legal significance of the rule of law concept or/and principle in a general meaning; 2) linking to the rule of law requirements, which are under active consideration; 3) fair trial and access to court; 4) addressing to the importance of the discretionary powers limitation; 5) effective control over the implementation of human rights and freedoms [16, p. 36]. This also can be found in the international scientific studies. Back in 2007, E. Jurgens, rapporteur of the Commission on Legal Affairs and Human Rights (Parliamentary Assembly of Council of Europe), in his report "The rule of law principle" pointed out: "The rule of law concept, with the idea of pluralistic democracy and human rights doctrine, represents a fundamental principle and common European values, particularly stipulated in the Statute of the Council of Europe and the European Court of Human Rights case law". According to the lawyer, there are following ECHR's rule of law components: 1) principle of legal certainty and predictability of law; 2) principle of equality before the law; 3) control of the executive, in cases, where public freedom is threatened; 4) access to justice; 5) right to a fair trial; 6) protection and control of the judiciary; 7) consolidation of European public order in the human rights area [14].

It is assumed, suggested list of the rule of law components is not comprehensive and with the years should be refilled. Moreover, the author, further developing the abovementioned idea, strongly believes, the list of the rule of law requirements constantly changes, taking into consideration national legal traditions and law enforcement practice.

After considering the different views, expressed in the legal literature as well as a certain ECHR's case law, the author is of the opinion, there are **two ways**, according to which the rule of law is established in the Court's decision. From this perspective, in accordance with the *first approach*, the Court does not offer an explicit rule of law definition. Although, there is no a comprehensive definition in the text, the investigated principle is stipulated, for example, through the proclaiming its importance in the European Community transformation. For instance, in a decision taken by the Court against Ukraine, was outlined the following: "Under the Court's settled case-law, the right to a fair hearing before a tribunal, as guaranteed by Article 6 § 1 of the Convention, must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, inter alia, that where the courts have finally determined an issue, their ruling should not be called into a question" [19]. Thuswise, listed-above way is designed to show the rule of law is a "vivid" instrument for the conflict regulation of public affairs (on both national and international levels). In addition, it contains strong messages on the rule of law as the principle that pervades the entire text of the Convention. There are instances, where the rule of law principle is used to serve as a sovereign remedy, aimed at countering arbitrary exercise of the state authority. Along with this, Court in its judgments quite often uses such expressions, as a "state subject to the rule of law", a "state governed by the rule of law" or a "state based on the rule of law" [5; 6]. In this connection, it is pertinent to interpret abovementioned expressions in the *unity* of three following *specifications*:

– legislative bodies must not only respect the laws, but also ensure legal and practical modalities for their implementation;

– judiciary must represent itself as a body, which guarantees the equality; it must enjoy the public confidence and protect fundamental values of a law-based State;

– executive authorities must apply the instruments necessary for the enforcement of judgments; public

authorities' interests must correspond exactly with the need of an adequate dispensation of justice.

The nexus between abovementioned statements lies in the common for them demand – the existence of clear and comprehensive list of cases, where discretion can be applied. Therefore, the law has to emphasize on the limits of any discretionary power given to the public authorities, taking into account the legitimate aim of such a remedy.

As the result, it is our conviction, ECHR's *"anti-definitive" approach* to the rule of law is essentially intended to show the Court interprets it by relying on the specific life circumstances, thereby ensuring the rule of law efficacy as a kernel in the international human rights machinery.

As has been mentioned above, generally, there are two ways of the rule of law affirmation in the ECHR's case law. The *second* one is a so-called *structurally-systematic approach*, accordingly to which the rule of law structure is "splitting into" special "molecular particles", otherwise known as the rule of law sub-principles. Therefore, the rule of law content is regarded as an integrated model, comprised of individual legal principles, non-compliance or even the violation of which causes destruction of the whole rule of law normative structure. Having said this, the applying of the structural systematic approach enables the researcher to single out **three clusters** of the rule of law elements, which are shown in the Court decisions. Each of these clusters has its own extensive system of requirements/structural elements of the rule of law.

I. *Institutional framework* and organization of the government includes:

– separation of powers [9];

– the independence of the judiciary; in "Guja v. Moldova" case, Court in the light of the violation of the article 10 of Convention agreed with the applicant, the practice of "telephone justice" is a serious drawback for the rule of law functioning in Moldova. Having identified, the judiciary lacked independence and was influenced by the executive through the Supreme Council of Magistracy, Court had recognized the rule of law was endangered because of "loyalty" of the judiciary to the Moldova's governing party in 2002 [7].

II. *Principle of legality*, which in its content also binds such essential principles as the principle of legal certainty and the principle of equality before the law. Specified above guidelines (in their unity) provide a traditional basis for the rule of law concept:

– the principle of legality suggests the following two requirements of its effective actualizing: 1) the law must be sufficiently accessible and predictable; 2) the law must be clear and define the limits of any discretion, which is given to designated officials in order to apply legislation properly [1; 4];

– the principle of legal certainty in its elemental composition may provide such requirements: a) the State's obligation to respect the law and apply its provisions consistently and in accessible for the public way; adherence to the principle of res judicata; b) the obligation concerning enforcement of court decisions [3].

III. *Due process*: judicial review, access to the courts and remedies as well as a fair trial:

– interference by the executive into the rights and freedoms of individuals should be the subject of an effective control [8];

– availability of such procedural requirements and guarantees as openness of trials and publicity of judicial examination [10];

– access to the courts and effective legal protection (free legal aid) [2];

– guaranteeing the right to a fair trial, which means participants make full use of their intrinsic rights [11].

Taking into consideration the above mentioned, it is possible to make the following ***conclusions***.

1. On the basis of the professional literature and case-law analysis, it must be underscored that common for legal science and practice a broad understanding of the rule of law essence must not to be rejected. It assumes, the very idea of the rule of law is not "one size fits all" concept. It is applied to the real socio-political relations, at the same time transforming and adapting to the specific legal circumstances. That is why the ECHR's rule of law doctrine has an important legal and axiological value for the national judicial system reformation.

2. It is reasonable to distinguish two modes (forms) of the rule of law manifestation in the Court's case law: 1) a mere reference of the researched concept in the text of the Court's decision without disclosing the specific content of the latter; primarily, this way is aimed at the recognition of the rule of law as an inexhaustible source of human rights and freedoms; in this context, rule of law is one of the basic principles underpinning all Court's actions; 2) reflecting ontological rule of law functionality from the perspective of its constituent elements; among such structural components are so-called sub-principles (which in this context are seen in conjunction and hence define functional use of the rule of law).

3. Formulated as a universal principle, the rule of law also carries the systematically important for the ECHR functions, among which it is necessary to mark out: a) basic (regulatory) function – interfusing the whole system of Convention's norm, the rule of law lays the groundwork to the entire process of legal consciousness; b) stabilizing function – the rule of law (particularly, the principle of legal certainty) is called upon to create stable environment (that is conditions) for the legal regulation in general; c) integrative, according to which the rule of law principle simultaneously acts in two legal frameworks: as a supreme human rights principle and as a guiding principle of national legal systems building; d) prognostic function, in accordance to which the rule of law regulates not only current public relations, but also creates conditions, necessary for encouraging new law enforcement models; e) guarding function – in its purpose the rule of law is intended to protect individuals: 1) from the arbitrariness in State actions, together with 2) ensuring an adequate law and order situation; thus, the rule of law vested with ambivalent nature, which holds, there is a need to create a behavior pattern in society and prevent the possible appearance of conflict of

domestic and international character. Among these functions it seems appropriate to highlight additional, but equally important directions for the rule of law action. Specifically, the sense of communicative function is in that the rule of law is intended to promote an effective dialogue between the European community and national governments in order to create new or modify existing standards of human rights and freedoms. In this context, it is crucial to underline another function – interpretive. It represents the main purpose of the rule of law in the ECHR – to serve as an effective tool for legal interpretation of the Convention, thereby creating the conditions for its brand new substantive content.

Prospects for continued rule of law developing in Ukrainian legal science and practice. Primarily, there are problems, related to the effective implementation of the provisions of the Law of Ukraine "On the enforcement and application of European Court of Human Rights practice". The bottom line of the abovementioned challenge is to evaluate the real effectiveness of the national legislation. Conversely this evaluation should be carried out by monitoring judgments and decisions, after they have been handed down. There is also an urgent need to study the rule of law functioning in other international judicial bodies in order to fill the juridical vacuum and redress the paucity of relevant national laws.

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